Supreme Court, U.S.
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No. ___

IN THE
Supreme Court of the United States

DENNIS HECKER, JONNA DUANE, AND JANICE RIGGINS,
Petitioners,

v

DEERE & COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

JEROME J. SCHLICHTER
DANIEL V. CONLISK
SCHLICHTER, BOGARD & DENTON
100 South Fourth Street
Suite 900
St. Louis, Missouri 63102
(314) 621-6115

DAVID C. FREDERICK
Counsel of Record
DEREK T. HO
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

October 14, 2009

QUESTIONS PRESENTED

Congress passed the Employee Retirement Income Security Act of 1974 ("ERISA") to create "judicially enforceable standards to insure honest, faithful, and competent management of pension and welfare funds" *Massachusetts Mut Life Ins Co. v Russell*, 473 U.S 134, 140 n 8 (1985) (internal quotations omitted). Section 404(a) of ERISA requires pension plan fiduciaries to act solely for the benefit of plan participants and to use the care that "a prudent man acting in a like capacity and familiar with such matters would use" 29 U S C § 1104(a)(1) Section 404(c) creates a limited exemption from liability for plan losses that are not caused by the fiduciary's breach of duty but instead "result[] from [the] participant's exercise of control" over plan assets. *Id* § 1104(c)(1)(A)(ii)

The questions presented are:

1 Whether the court below erroneously held – despite a contrary decision of the Fourth Circuit and the authoritative interpretation of the Department of Labor ("DOL") – that a plan fiduciary's imprudent selection of investment options with excessive fees is exempt from liability under § 404(c) of ERISA, as long as plan participants can choose from a sufficiently broad range of investment options

2 Whether the court below erred in holding – contrary to numerous other circuit decisions and the considered views of DOL – that petitioners' allegations that a plan fiduciary selected retail mutual funds with excessive fees, without adequate investigation and without any effort to explore readily available, lower-cost options, failed to state a claim under § 404(a) of ERISA.

LIST OF PARTIES TO THE PROCEEDING

Petitioners Dennis Hecker, Jonna Duane, and Janice Riggins were plaintiffs in the district court proceedings and appellants in the court of appeals proceedings

Respondent Deere & Company was a defendant in the district court proceedings and an appellee in the court of appeals proceedings.

Fidelity Management Trust Company and Fidelity Management & Research Company were defendants in the district court proceedings and appellees in the court of appeals proceedings, but, pursuant to this Court's Rule 12 6, are not parties in this Court because petitioners do not seek review of the portion of the decision below affirming the district court's dismissal of their claims against those defendants

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Dennis Hecker, Jonna Duane, and Janice Riggins respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case

INTRODUCTION

This case presents an exceptionally important issue of federal pension law that has divided the lower courts American employees hold more than $5 2 trillion in assets in pension plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), accounting for nearly 13% of all household financial assets in the United States. *See* Investment Company Institute, *The U S Retirement Market, First Quarter 2009*, at 1-3 (Aug 2009), *available at* http //www ici org/pdf/09_q1_retmrkt_update pdf (hereinafter "*U S Retirement Market*") Pension plan participants do not have free rein to invest the retirement assets in those pension plans Rather, participants' choices are limited to a range of investment options selected by the plan's administrator. The value of a participant's retirement assets upon redemption is a function not only of the performance of the chosen investment, but also, critically, of the fees and expenses incurred

To protect the value of the assets of American employees' pension plans, ERISA imposes strict fiduciary duties on plan administrators Plan administrators must act "solely in the interest" of the plan's beneficiaries, and they must use "the care, skill, prudence, and diligence . that a prudent man acting in a like capacity and familiar with such matters would use." 29 U S C § 1104(a)(1)(B) Accordingly, when selecting investment options for the plan, plan administrators must not only avoid self-dealing, but also "employ[] the appropriate methods to investigate

the merits of the investment and to structure the investment." *Flanigan v. General Elec. Co.*, 242 F.3d 78, 86 (2d Cir. 2001) (internal quotations omitted).

In the decision below, the Seventh Circuit created an enormous and unjustified loophole in ERISA's fiduciary protections. Petitioners' complaint alleged that respondent Deere, the administrator of two ERISA-governed plans in which petitioners participate, imprudently limited participants' investment options to retail mutual funds offered by affiliates of Fidelity Investments ("Fidelity"), without any investigation into whether those mutual funds' fees (ranging from 0.07% for index funds to over 1% for actively managed funds) were reasonable for a plan of Deere's size ($2.5 billion) and without any effort to explore other readily available and less costly investment alternatives. By contrast to the mutual fund fees charged by Fidelity, the largest money managers charge pension funds, on average, fees of only 0.08%. Thus, Deere caused the plans, in some instances, to pay more than 10-fold what comparable pension funds pay, and participants incurred significant losses that Deere readily could have avoided.

The Seventh Circuit dismissed the complaint with prejudice, holding that defendants were immunized from liability by § 404(c) of ERISA and, in the alternative, that petitioners' allegations failed to state a claim under § 404(a) of ERISA. Both holdings warrant this Court's review. As the Seventh Circuit itself recognized, *see* Pet. App. 26a, its expansive interpretation of § 404(c)'s exemption from liability conflicts not only with the Department of Labor's ("DOL") longstanding interpretation of § 404(c) and its implementing regulations, but also with a decision of the Fourth Circuit. *See infra* pp. 14-18.

Moreover, the Seventh Circuit's alternative holding under § 404(a) ignores decades of precedent from other circuits, as well as DOL's consistent and carefully considered views *See infra* pp. 22-28

The proper scope of ERISA's fiduciary duty to select prudent investments is critically important to tens of millions of American employees whose retirement savings are invested through ERISA-governed pension plans Each year, American employees lose hundreds of millions of dollars due to imprudent selection of investment options with unnecessary fees This Court should grant review and reverse the Seventh Circuit's unwarranted exemption from fiduciary liability for such imprudent investment selection.

OPINIONS BELOW

The opinion of the court of appeals (Pet App 1a-31a) is reported at 556 F 3d 575 That opinion was supplemented as part of the order denying rehearing (Pet App. 50a-54a), which is reported at 569 F.3d 708 The opinion of the district court (Pet App 32a-48a) is reported at 496 F Supp 2d 967

JURISDICTION

The court of appeals entered its judgment on February 12, 2009 A petition for rehearing was denied on June 24, 2009 *See* Pet. App. 49a-54a On September 14, 2009, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including October 14, 2009. *See id* at 84a. The jurisdiction of this Court is invoked under 28 U S.C § 1254(1)

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 404 of ERISA, 29 U.S C § 1104, and 29 C F R § 2550.404c-1 are set forth at Pet App 55a-83a.

STATEMENT OF THE CASE

A. Statutory And Regulatory Background

Congress, aware of the critical importance of retirement plans to the American economy and American workers, passed ERISA to "assur[e] the equitable character of [employee benefit plans] and their financial soundness." *Central States, Southeast & Southwest Areas Pension Fund v Central Transp., Inc.*, 472 U S. 559, 570 (1985). "The floor debate reveals that the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators " *Massachusetts Mut Life Ins. Co. v Russell*, 473 U S. 134, 140 n.8 (1985) To address that concern, ERISA requires that employee benefit plans "provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan " 29 U S.C § 1102(a)(1) Among the central responsibilities of plan fiduciaries is the duty to select appropriate investment options for the plan

ERISA's statutory provisions "abound[] with the language and terminology of trust law " *Firestone Tire & Rubber Co v. Bruch*, 489 U.S 101, 110 (1989) Rather than enumerate all applicable requirements, ERISA imposes general fiduciary duties of loyalty and prudence, which are the "highest known to the law," *Donovan v Bierwirth*, 680 F 2d 263, 272 n 8 (2d Cir. 1982), and directs federal courts to apply them in specific cases. *See* 29 U S.C § 1104(a)(1) (duty to act "solely in the interest of the participants and be-

neficiaries"); *id* § 1104(a)(1)(B) (duty to act with "the care, skill, prudence, and diligence that a prudent man acting in a like capacity and familiar with such matters would use") Plan participants are empowered to enforce these duties through private civil actions for damages or equitable relief *See id* §§ 1109(a), 1132(a)

ERISA also establishes a limited "safe harbor" from civil liability for fiduciary breach in certain circumstances where the "pension plan provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account" *Id* § 1104(c)(1)(A). For the safe harbor to apply, a plan must meet the standards promulgated by the Secretary of Labor ("Secretary") for an "ERISA section 404(c) plan" by, among other things, giving a participant "independent control in fact with respect to the investment of assets in his individual account" 29 C F.R § 2550.404c-1(c) Even when those prerequisites are satisfied, ERISA makes clear that fiduciaries are protected from liability only for a "loss . which results from such participant's or beneficiary's exercise of control." 29 U S C § 1104(c)(1)(A)(ii) As described more fully below, pursuant to expressly delegated authority, the Secretary has consistently interpreted § 404(c) and her own implementing regulation, 29 C F.R § 2550 404c-1, to mean that fiduciaries are not immunized from liability for losses attributable to a plan fiduciary's improper selection of investment options, because such losses are not the "direct and necessary result of that participant's or beneficiary's exercise of control." *Id* § 2550 404c-1(d)(2); *see infra* pp 18-22

B. Factual Background

Petitioners are participants in two tax-qualified defined-contribution pension plans, popularly known as "401(k)" plans, established by Deere, a manufacturer of heavy equipment for use in agriculture, construction, forestry, and landscaping, with more than 47,000 employees in 26 countries worldwide. The two plans – called the Savings & Investment Plan and the Tax Deferred Savings Plan – operate in substantially the same fashion· qualified Deere employees are permitted to contribute a certain amount of their pre-tax earnings into an individual plan account, and Deere matches those contributions in varying percentages up to 6%. Deere may also make profit-sharing contributions to the Savings & Investment Plan As of the end of 2005, the two Deere plans held more than $2 5 billion in contributed assets

Because ERISA requires that pension plan assets be held in trust, *see* 29 U S C. § 1103(a), Deere, as the plans' sponsor and administrator, *see id* § 1002(16), entered into a written trust agreement in 1991 with Fidelity Management Trust Company ("Fidelity Trust"), a subsidiary of Fidelity Investments, to provide administrative and recordkeeping services as the plans' trustee. That agreement also provided that Deere's selection of mutual funds for the plans would be limited to funds offered by another Fidelity affiliate, Fidelity Management & Research Company ("Fidelity Research") Fidelity Research is a registered investment company that acts as the investment advisor to the Fidelity family of mutual funds It is compensated for those services through fees – calculated as a percentage of assets and

expressed as an "expense ratio" – that it charges to each of the Fidelity funds that it advises.

At the time of petitioners' Second Amended Complaint ("Amended Complaint"), participating employees could invest plan contributions in 26 primary investment options Of those 26 options, 23 were retail Fidelity mutual funds – the same mutual funds that Fidelity makes available to any investor in the general public, large or small The three remaining options consisted of two Fidelity pooled funds – investment vehicles similar to mutual funds – managed directly by Fidelity Trust, and an investment fund that held exclusively Deere common stock Participants also had access to BrokerageLink, a service by which Fidelity enables participants, for a fee, to invest in a large number of additional retail mutual funds offered by Fidelity as well as other mutual fund companies. All of the mutual fund options Deere made available to plan participants were retail mutual funds, which, as discussed further below, charge significantly higher fees than other investment options readily available to large institutional investors such as the Deere plans

C. Proceedings Below

1. On December 8, 2006, petitioners filed a complaint against Deere and Fidelity in the United States District Court for the Western District of Wisconsin. The crux of petitioners' complaint against Deere, as amended, was that Deere failed to conduct a prudent investigation of the retail Fidelity mutual funds and their associated fees, and made no effort to use the plans' large size (more than $2 5 billion in assets) to obtain better than retail-level fees from

Fidelity or another investment manager [1] As a result of this imprudence, the plans and their participants paid unnecessary and excessive fees to Fidelity, and suffered significant economic losses. *See* Am Compl ¶¶ 36, 44, 76, 105 The complaint further alleged that, under an undisclosed arrangement by which Fidelity Research shared certain revenue with Fidelity Trust, Deere caused plan participants to incur these excessive fees as a means of covering payments that Deere otherwise would have paid to Fidelity Trust for its administrative services, in violation of Deere's duties of candor and loyalty *See id* ¶¶ 88-90, 125; *see also* Pet App 17a-18a (finding that Deere "creat[ed] the impression that it was generously subsidizing its employees' investments by paying something to Fidelity Trust when it was doing no such thing").[2]

In March 2007, Deere filed a motion to dismiss the Amended Complaint. According to Deere, petitioners' claim that Deere breached its fiduciary duties by imprudently selecting unduly expensive investment options – specifically, retail mutual funds with unne-

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[1] Petitioners alleged that Fidelity was liable for breach of fiduciary duty because it was involved with Deere in the selection of investment options for the plans The district court dismissed the claims against Fidelity on the ground that the trust agreement gave Deere "sole responsibility for selection of plan investment options" Pet App 47a The court of appeals affirmed Although petitioners believe that ruling is erroneous because fiduciary status under ERISA turns on how an entity functions, not what the documents recite, they acknowledge that the issue is fact-bound and thus do not challenge it here

[2] The complaint also alleged that Deere's failure to disclose the revenue-sharing arrangement constituted an independent violation of Deere's fiduciary duties under ERISA Both the district court and the court of appeals disagreed and dismissed that aspect of the complaint

cessarily high fees – was barred by the "safe harbor" under § 404(c) of ERISA

2. The district court dismissed the complaint in its entirety, with prejudice With respect to petitioners' claim of imprudent investment selection, the court acknowledged that Deere "could have negotiated lower fees with Fidelity Research, or could have selected different funds from different providers with lower rates." Pet App 35a. The court also recognized that Deere "made no effort" to obtain lower prices for the plans' beneficiaries *Id.* Notwithstanding Deere's acknowledged failure to take any steps to reduce beneficiaries' costs, the court held that Deere was immune from liability under § 404(c) of ERISA because, "to the extent participants incurred excessive expenses, those losses were the result of participants exercising control over their investments." *Id* at 46a-47a The court reasoned that participants had access to a wide range of retail mutual funds that "were also offered to investors in the general public" and that it was "untenable to suggest that all of the more than 2500 publicly available investment options had excessive expense ratios" *Id* at 46a In addition to dismissing petitioners' complaint, the court assessed more than $200,000 in costs on petitioners

3. On appeal, the Secretary of Labor (then Elaine L Chao) filed a brief as *amicus curiae* in support of petitioners, arguing that the district court had erred in construing the § 404(c) safe harbor to immunize plan fiduciaries from liability for imprudent selection of investment options ("DOL Initial Brief") The Secretary noted that the preamble to DOL's 1992 regulations implementing § 404(c) provided that "the act of designating investment alternatives . in an

ERISA section 404(c) plan is a fiduciary function to which the limitation on liability provided by section 404(c) is not applicable." 57 Fed Reg 46,906, 46,922 (Oct 13, 1992) The selection of investment options does not fall under the plain terms of § 404(c) or the Secretary's implementing regulations because "the act of limiting or designating investment options which are intended to constitute all or part of the investment universe of an ERISA 404(c) plan . . . is not a direct or necessary result of any participant direction of such plan" *Id.* at 46,924 n 27. The Secretary's *amicus* brief contended that her interpretation was entitled to *Chevron*[3] deference because it had been issued after notice-and-comment rulemaking pursuant to an express delegation of authority by Congress, and had been consistently adhered to by DOL. *See* DOL Initial Br. 15-17

Despite the Secretary's contentions, the Seventh Circuit affirmed First, the court held that petitioners' allegations "that Deere violated its fiduciary duty by selecting investment options with excessive fees" failed to state a claim for breach of fiduciary duty under ERISA because "the undisputed facts leave no room for doubt that the Deere Plans offered a sufficient mix of investments for their participants" Pet. App. 19a The Seventh Circuit, like the district court, relied on the fact that "there was a wide range of expense ratios" (0.07% to just over 1%) among the retail mutual funds available to plan participants *Id* Moreover, "all of these funds were also offered to investors in the general public, and so the expense ratios necessarily were set against the backdrop of market competition." *Id.* According to the court,

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[3] *Chevron U S A Inc v Natural Res Def Council, Inc*, 467 U S 837 (1984)

that combination of pled facts – the supposedly broad range of retail funds offered by Deere with a supposedly wide range of fees set against the backdrop of market competition – was sufficient to defeat petitioners' claim of imprudent selection of investment options at the pleading stage Like the district court, the Seventh Circuit acknowledged that Deere could have obtained lower fees through other investment vehicles, such as institutional funds, but it dismissed that fact as "beside the point" for purposes of dismissal of petitioners' complaint, because "nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund " *Id* at 19a-20a

Moreover, the Seventh Circuit held that, "[e]ven if [it had] underestimated the fiduciary duties that Deere had to its plan participants," Deere was exempt from liability under § 404(c) *Id.* at 21a Although the court declined to decide whether § 404(c) "always shield[s] a fiduciary from an imprudent selection of funds under every circumstance that can be imagined," it ruled in the decision below that § 404(c) does protect a fiduciary as long as it "includes a sufficient range of options so that the participants have control over the risk of loss " *Id.* at 26a According to the court, as long as there is a sufficiently "broad range of investment alternatives" with a variety of fees to allow plan participants to diversify and manage their exposure to fees, any investment loss caused by excessive fees is attributable to the participants' own investment choices *Id* at 26a-27a The court relied on the Fifth Circuit's decision in *Langbecker v Electronic Data Systems Corp* , 476 F.3d 299, 310-11 (5th Cir 2007), but it also recognized that its holding was at odds with the Fourth Circuit's contrary decision in *DiFelice v U S*

Airways, Inc., 497 F.3d 410, 418 n.3 (4th Cir. 2007). *See* Pet. App. 26a.

4. On petition for rehearing, the Secretary (now Hilda L. Solis) once again filed an *amicus* brief in support of petitioners. As in DOL's initial *amicus* brief, the Secretary again objected to the Seventh Circuit's refusal to give *Chevron* deference to "the Secretary's interpretation of [ERISA] and her 404(c) regulation" and expressed disagreement with the panel's holding that an imprudent selection of investment options is insulated from liability as long as the fiduciary provides a sufficiently broad range of investment choices. DOL Rehearing Br. 1-2. The Secretary also criticized as "mistaken" the Seventh Circuit's "conclusion that the fees [incurred by the plans] were necessarily prudent because the Plans' array of investment funds w[as] offered 'to the general public' at the same expense ratios that the Plans paid." *Id.* at 9-10. The Secretary noted that petitioners' core "assertion that the fiduciaries could and should have considered fees and favorable pricing arrangements finds some support in the Secretary's previous pronouncements," *id.* at 11 n.1, and she took issue with the Seventh Circuit's disposition of the case on the pleadings, "without full consideration of any evidence that might be developed and introduced," *id.* at 13. The Secretary urged the panel to reconsider its decision in light of the "far-reaching ramifications" of its holding, which would "permit[] fiduciaries to evade accountability for the imprudent selection and maintenance of funds in defined contribution plans" nationwide. *Id.* at 2.

The Seventh Circuit denied rehearing and rehearing *en banc*. In its order denying rehearing, the panel supplemented its original opinion in response to

the Secretary's *amicus* brief First, the panel refused to give *Chevron* deference to the Secretary's interpretation of § 404(c) and her own implementing regulations, on the ground that it was not contained "in the regulation proper," but only in a preamble to the regulation Pet App 50a. The panel then dismissed the Secretary's concerns about the ramifications of its decision as "more hypothetical than real" *Id* at 52a The panel claimed that its decision was "limited to the complaint before the court." and it denied that it would give a "green light" to "reckless" inclusion of "unsound" investment alternatives based on "the simple expedient of including a very large number of investment alternatives" in the portfolio. *Id* at 52a-53a However, the panel did not explicitly repudiate its holding that § 404(c) shields a fiduciary as long as it "includes a sufficient range of options so that the participants have control over the risk of loss" *Id* at 26a. Instead, the panel continued to rest its affirmance of the district court's dismissal on the fact that the particular package of mutual funds offered by the Deere plans gave participants thousands of investment options with significant "variation in associated fees." *Id.* at 54a.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's interpretations of § 404(c) and § 404(a) of ERISA warrant this Court's review because they are at odds with the decisions of other federal courts of appeals and the position of DOL, and they undermine critical congressional policies under ERISA. The Seventh Circuit's refusal to apply DOL's longstanding interpretation that § 404(c) does not immunize a plan fiduciary from liability for improper selection of investment options runs contrary to a decision of the Fourth Circuit Likewise, the Seventh Circuit's view that a claim for imprudent investment selection can be foreclosed by the availability of a broad range of retail mutual fund options with market-based fees is at odds with both DOL policy and longstanding case law from other circuits.

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE DIVISION AMONG THE LOWER COURTS ON THE PROPER INTERPRETATION OF § 404(c) OF ERISA

A. The Seventh Circuit's Refusal To Defer To DOL's Construction Of § 404(c) Deepens The Division Among The Courts Of Appeals

The question whether § 404(c) immunizes a plan fiduciary from liability arising from the fiduciary's selection of investment options has divided both the federal courts of appeals and the federal district courts The Secretary's interpretation of § 404(c) since 1992 has provided that liability for losses due to a fiduciary's selection of improper investment alternatives is not foreclosed by § 404(c) because such losses do not "result[] from" the participant's "exercise of control" over the assets in his account 29 U.S.C § 1104(c)(1)(a)(A)(ii). The Seventh Circuit

rejected that longstanding interpretation and held that fiduciaries are immunized from liability for any such losses under § 404(c) as long as they "include[] a sufficient range of options so that the participants have control over the risk of loss." Pet. App. 26a.

As the Seventh Circuit recognized, that holding deepened a preexisting disagreement between the Fourth and Fifth Circuits. In *Langbecker*, a divided panel of the Fifth Circuit also rejected the Secretary's interpretation of § 404(c) and her own implementing regulation. The majority in *Langbecker* recognized that there is "much disagreement" about whether the Secretary's interpretation is entitled to deference. 476 F.3d at 310 n.22. Without resolving that question, the majority held that, even assuming that *Chevron* deference applied, the Secretary's interpretation was unreasonable. In the majority's view, the Secretary's "contradict[ed] the governing statutory language" because it would "render the § 404(c) defense applicable only where plan managers breached no fiduciary duty" and thus "eliminate [the] § 404(c) defense altogether." *Id.* at 311. The majority held, instead, that whether § 404(c) bars a claim of improper investment selection must be analyzed on a "transactional, case-by-case" basis. *Id.*

Judge Reavley, in dissent, criticized the majority for "misappl[ying]" § 404(c). *Id.* at 319. He would have held that "imprudent designation of an option for participants to choose constitutes grounds for fiduciary liability, and falls outside the scope of participant control envisaged by § 404(c)." *Id.* Judge Reavley concluded that the Secretary's interpretation was entitled to *Chevron* deference under this Court's decisions because it had been promulgated as part of a final rule after formal notice-and-comment processes.

under the Administrative Procedure Act ("APA") and because it had been "uniformly adhered to" by DOL *See id* at 320, *see also infra* pp 18-22 Judge Reavley also concluded that the Secretary's interpretation was reasonable because, "[i]f no duty of prudence attaches to selection of investment options, plan fiduciaries could imprudently select a full menu of unsound investments, among which participants would be free to choose at their peril, while the fiduciaries remain insulated from responsibility." 476 F.3d at 321-22

In contrast with the decision below and the Fifth Circuit's decision in *Langbecker*, the Fourth Circuit in *DiFelice* expressly adopted the Secretary's interpretation and ruled that the § 404(c) "safe harbor provision does not apply to a fiduciary's decisions to select and maintain certain investment options within a participant-driven 401(k) plan." 497 F 3d at 418 n 3 Citing Judge Reavley's dissent in *Langbecker*, the Fourth Circuit stated that, "although section 404(c) does limit a fiduciary's liability for losses that occur when participants make poor choices from a satisfactory menu of options, it does not insulate a fiduciary from liability for assembling an imprudent menu in the first instance" *Id.* Had petitioners' complaint been brought in the Fourth Circuit, § 404(c) would have offered defendants no immunity from liability. Indeed, the *Hecker* panel expressly acknowledged that *DiFelice* is squarely at odds with *Langbecker* and the decision below Pet App. 26a

The division among the Fourth, Fifth, and Seventh Circuits has spawned inconsistent decisions in the federal district courts *See, e g., In re Washington Mut., Inc Sec , Derivative & ERISA Litig* , No 2.08-md-1919 MJP, 2009 WL 3246994, at *7 (W.D Wash

Oct 5, 2009) (recognizing disagreement between *Hecker* and *DiFelice*), *Page v Impac Mortgage Holdings, Inc*, No. SACV 07-1447 AG (MGLx), 2009 WL 890722, at *4 (C D Cal Mar 31, 2009) (noting the "directly conflicting circuit court cases on this issue") On one hand, virtually all of the district court decisions outside of the Fifth and Seventh Circuits have sided with DOL, *DiFelice*, and Judge Reavley's dissenting opinion in *Langbecker*, and have held that the § 404(c) "safe harbor" does not foreclose claims alleging improper selection of investment alternatives for an ERISA-governed pension plan [4] In the Seventh Circuit, however, district courts are now bound by the contrary decision below *See Lingis v Motorola, Inc.*, No. 03 C 5044, 2009 WL 1708097, at *13 (N.D Ill June 17, 2009) (following *Hecker* but recognizing the inconsistent holdings of *Tyco* and *Page*); *Abbott v. Lockheed Martin Corp.*, No 06-cv-

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[4] *See Tibble v Edison Int'l*, No CV 07-5359 SVW (AGRx), 2009 WL 2382340, at *41-*42 (C D Cal July 16, 2009) (disagreeing with *Hecker* and "find[ing] that the § 1104(c) safe harbor does not apply" to "claims of imprudent or disloyal selection of investment options"), *clarified on other grounds*, 2009 WL 2382348 (C D Cal July 31, 2009), *Page*, 2009 WL 890722, at *4 (adopting *DiFelice*, Judge Reavley's dissent in *Langbecker*, and DOL's interpretation), *In re Tyco Int'l, Ltd Multidistrict Litig*, 606 F Supp 2d 166, 169 (D N H 2009) (agreeing with Judge Reavley's dissent in *Langbecker* that "DOL's interpretation of its own regulations is reasonable and should not be ignored"), *Kanawi v Bechtel Corp*, 590 F Supp 2d 1213, 1232 (N D Cal 2008) (Breyer, J) (adopting DOL's interpretation), *Tatum v R J Reynolds Tobacco Co*, 254 F R D 59, 65-66 (M D N C 2008) (following *DiFelice*), *see also Spano v Boeing Co*, No 06-cv-743-DRH, 2007 WL 2688456, at *1 (S D Ill Sept 10, 2007) (noting that "[t]he majority of courts to have interpreted ERISA § 404(c) have adopted the DOL's position") (citation omitted), *Langbecker*, 476 F 3d at 322 n 5 (Reavley, J , dissenting) (citing additional cases)

0701-MJR, 2009 WL 839099, at *6 (S.D Ill Mar 31, 2009) (dismissing complaint based on *Hecker*); *cf. Boeckman v A.G Edwards, Inc.*, Civil No 05-658-GPM, 2007 WL 4225740, at *6 (S D Ill Aug 31, 2007) (pre-*Hecker* decision expressing doubt about *Langbecker*) Likewise, in the Fifth Circuit, district courts that had previously adhered to DOL's position are now bound by *Langbecker*'s ill-defined "transactional, case-by-case" approach to the § 404(c) safe harbor *Cf In re Enron Corp Sec., Derivative & ERISA Litig.*, 284 F. Supp 2d 511, 578-79 (S D Tex 2003) (adopting DOL's interpretation), *In re Dynegy, Inc ERISA Litig*, 309 F Supp. 2d 861, 893-94 & n 57 (S D Tex 2004) (same) The Court should grant certiorari to resolve the clear disagreement among the lower courts

B. The Seventh Circuit's Rejection Of DOL's Construction Of § 404(c) Is At Odds With This Court's Precedents And Should Be Reversed

The Seventh Circuit's decision is wrong and should be reversed It is well settled under this Court's administrative law precedents that a federal agency's interpretation of a federal statute or its own regulation, rendered pursuant to delegated authority and notice-and-comment rulemaking, must be "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute" *Chevron*, 467 U.S at 844; *see, e g*, *United States v Mead Corp*, 533 U S 218, 230 & n.12 (2001) (collecting cases) Here, not only did Congress generally delegate authority to the Secretary to "prescribe such regulations as he finds necessary or appropriate to carry out the provisions of" Title I of ERISA, 29 U.S C § 1135, but it also specifically instructed the Secre-

tary to prescribe regulations to determine when the conditions set forth in § 404(c) are satisfied Because Congress recognized that "there may be difficulties in determining whether [a] participant in fact exercises independent control over his account," it vested the Secretary with the power to make the necessary policy judgments regarding the scope and application of § 404(c) H R Conf Rep No 93-1280, at 305 (1974), *reprinted in* 1974 U.S.C.C A N 5038, 5086 ("[W]hether participants and beneficiaries exercise independent control is to be determined pursuant to regulations prescribed by the Secretary of Labor.")

Pursuant to that express delegation of authority, the Secretary issued a notice of proposed rulemaking ("NPRM") in 1991. *See* 56 Fed Reg 10,724 (Mar 13, 1991). The Secretary's proposed regulation provided that, "[i]f a participant or beneficiary of an ERISA section 404(c) plan exercises independent control over assets in his individual account in the manner described in paragraph (d) of this section, then no other person who is a fiduciary with respect to such plan shall be liable to such participant or beneficiary for any loss, or with respect to any breach of part 4 of Title I of the Act, that is the direct and necessary result of that participant's or beneficiary's exercise of control" *Id* at 10,737-38 (proposed 29 C.F.R. § 2550.404c-1(e)(2)) The Secretary made clear in the NPRM, moreover, that proposed § 2550 404c-1 would not foreclose liability for improper selection of investment options, because "the act of limiting or designating investment options which are intended to constitute the investment universe of an ERISA 404(c) plan is a fiduciary function which, whether achieved through fiduciary designation or express plan language, is not a direct or necessary result of

any participant direction of such plan" *Id* at 10,732 n.21.

Numerous commentators addressed the Secretary's proposed regulations, including comments directed at the issue of fiduciary duties in investment selection. *See* 57 Fed Reg at 46,922-23, 46,925. Ultimately, the Secretary adhered to the proposed regulation's "direct and necessary result" requirement *See id* at 46,935 (promulgating 29 C F.R. § 2550.404c-1(d)(2)). Moreover, "[a]fter carefully reviewing the public comment on this matter," the Secretary twice emphasized in the preamble to the final regulation that, under the final rule, "the act of designating investment alternatives . in an ERISA section 404(c) plan is a fiduciary function to which the limitation on liability provided by section 404(c) is not applicable." *Id.* at 46,922, *see id* at 46,924 n.27 ("[T]he Department points out that the act of limiting or designating investment options which are intended to constitute all or part of the investment universe of an ERISA 404(c) plan is a fiduciary function which . is not a direct or necessary result of any participant direction of such plan") This part of DOL's preamble was thus an integral part of the agency's final rule, which was promulgated pursuant to full notice-and-comment procedures under the APA

The Seventh Circuit's sole reason for refusing to give *Chevron* deference to the Secretary's preamble was that it was not codified "in the regulation proper" Pet. App 50a. That rationale puts form over substance and runs flatly contrary to this Court's precedents Indeed, many binding agency regulations are promulgated through formal orders, but not codified, and that distinction has never been material to the applicability of *Chevron* deference *See, e.g.*,

National Cable & Telecomms Ass'n v Brand X Internet Servs, 545 U S 967, 980 (2005) (applying *Chevron* to Federal Communications Com-mission declaratory ruling) Rather, the question of formality turns on the extent to which the agency's interpretation was "subject to the rigors of the [APA], including public notice and comment" *Mead*, 533 U S at 228 & n.9 (internal quotations omitted, brackets in original) Here, the preamble to the Secretary's 1992 regulations is entitled to *Chevron* deference because it went through the full rigors of notice-and-comment rulemaking

Moreover, even putting aside the regulatory preamble, "an agency's interpretation of its own regulations is controlling unless plainly erroneous or inconsistent with the regulations being interpreted" *Long Island Care at Home, Ltd. v Coke*, 551 U S 158, 171 (2007) (internal quotations omitted) Since 1992, in opinion letters[5] and numerous *amicus* briefs[6] under three successive presidential administrations, DOL has consistently construed the "direct and necessary result" requirement in its own regula-

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[5] *See* DOL Opinion Letter No 98-04A, 1998 WL 326300, at *3 n 1 (May 28, 1998), DOL Information Letter, 1997 WL 1824017, at *2 (Nov 26, 1997)

[6] *See* DOL Rehearing Br 7, DOL Initial Br 12-16, Br of Sec'y of Labor as *Amicus Curiae* in Support of Plaintiffs-Appellees 22-23, *Lively v Dynegy Inc*, No 07-2073 (7th Cir filed Oct 10, 2007), *available at* http //www dol gov/sol/media/briefs/lively (A)-10-10-2007 pdf, Br of Sec'y of Labor as *Amicus Curiae* Supporting Plaintiffs-Appellants 17 n 7, *In re Schering-Plough Corp ERISA Litig*, No 04-3073 (3d Cir filed Oct 21, 2004), *available at* 2004 WL 5215266, Br of Sec'y of Labor as *Amicus Curiae* Opposing Motions To Dismiss 37, *Tittle v Enron Corp*, Civ Action No H-01-3913 (S D Tex filed Aug 30, 2002), *available at* 2002 WL 32913113

tions, 29 C F.R § 2550.404c-1, to mean that liability for improper investment selection is not foreclosed by the § 404(c) safe harbor *Cf. Coke*, 551 U.S at 170-71 (upholding DOL regulation under *Chevron* even though it had changed over time) These definitive agency pronouncements are themselves entitled to deference because they "reflect the agency's fair and considered judgment on the matter in question." *Auer v. Robbins*, 519 U.S. 452, 462 (1997); *see also Fidelity Fed Sav & Loan Ass'n v Cuesta*, 458 U S. 141, 158 & n 13 (1982) (preamble to Federal Home Loan Bank Board regulation constituted "administrative construction of the [Board's] regulation, to which deference is clearly in order") (internal quotations omitted, ellipsis in original), *Rucker v Lee Holding Co.*, 471 F.3d 6, 12 (1st Cir 2006) (DOL regulatory preamble entitled to "controlling weight") The Seventh Circuit's rejection of DOL's construction of § 404(c) and its own regulations is clearly at odds with this Court's precedents and should be reversed

II. THE COURT SHOULD REVIEW THE SEVENTH CIRCUIT'S INTERPRETATION OF § 404(a) BECAUSE IT ALSO CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AND THE POSITION OF DOL

A. The Seventh Circuit's Newly Minted Defense To Fiduciary Liability For Imprudent Investment Selection Is At Odds With The Decisions Of Numerous Other Circuit Courts

The Seventh Circuit dismissed petitioners' allegations for failure to state a claim under § 404(a) of ERISA based on its conclusion – made without any discovery or evidentiary basis – that the specific

funds included by the Deere plans had a sufficiently wide range of fees that were "set against the backdrop of market competition." Pet. App. 19a. According to the Seventh Circuit, this range of funds and associated fees negated any duty by Deere to take advantage of available, lower-priced investment vehicles. Even though Deere could have obtained a better fee structure for its plans, "nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund." *Id.* at 19a-20a. The Seventh Circuit's holding is contrary to the decisions of numerous circuits and improperly curtails ERISA's fiduciary duty of prudent investment selection.

As this Court has recognized, ERISA's requirement that a plan fiduciary act with "the care, skill, prudence, and diligence" of "a prudent man acting in a like capacity and familiar with such matters," 29 U.S.C. § 1104(a)(1)(B), establishes an objective test derived from the common law's "prudent person" rule. *See Bruch*, 489 U.S. at 110-11, *see also, e.g.*, S. Rep. No. 93-127, at 29 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4865 (§ 404(a) of ERISA, "in essence, codifies and makes applicable to fiduciaries certain principles developed in the evolution of the law of trusts"). The cornerstone of the common-law duty of prudence is the requirement that a trustee use due care in investigating the investment in light of the purposes of the trust and the best interests of the beneficiaries. *See* Restatement (Second) of Trusts § 212 cmts. a-c (1959).

Consistent with this core common-law principle, the majority of the federal circuits have recognized that "the most basic of ERISA's investment fiduciary duties" is "the duty to conduct an independent inves-

tigation into the merits of a particular investment." *In re Unisys Sav. Plan Litig*, 74 F 3d 420, 435 (3d Cir 1996) The test under § 404(a)(1)(B) of ERISA focuses on the "fiduciary's conduct in arriving at an investment decision, not on its results, and ask[s] whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment" *Id* at 434, *see also, e g*, *DiFelice*, 497 F 3d at 418, 420; *Flanigan*, 242 F.3d at 86; *Roth v Sawyer-Cleator Lumber Co*, 16 F 3d 915, 917-18 (8th Cir. 1994), *Fink v National Sav & Trust Co*, 772 F 2d 951, 955-56 (D C Cir 1985); *Donovan v Mazzola*, 716 F.2d 1226, 1231-32 (9th Cir 1983), *Donovan v Cunningham*, 716 F 2d 1455, 1467 (5th Cir 1983)

DOL's regulations concerning the investment-selection duties of ERISA fiduciaries confirm ERISA's focus on the adequacy of the fiduciary's investigation Under those regulations, fiduciaries satisfy their duty of prudence under § 404(a) if they conduct a reasonable investigation and give "appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role the investment plays in that portion of the plan's investment portfolio." 29 C F R § 2550 404a-1(b)(1)(i)

The Seventh Circuit's singular focus on the result of Deere's investment decision – namely, the range of available mutual funds and fees – is at odds with these precedents because it "improperly focus[es] the breach of duty inquiry on results and ignore[s] the process by which a trustee made his decision." *Roth*, 16 F.3d at 918 Indeed, the crux of petitioners' claim

was that Deere could readily have selected other investment vehicles – such as institutional mutual funds – with significantly lower fees, by taking advantage of the plans' large size The three largest money managers, for example, charge an average fee of 0 08% to pension customers,[7] compared to the range of 0 07% to over 1% charged by Fidelity's retail mutual funds In dismissing this fact as "beside the point," Pet App 19a, the Seventh Circuit fundamentally departed from the longstanding rule adopted by its sister circuits that a "[c]ourt must inquire whether the individual trustees, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment" *Flanigan*, 242 F 3d at 86 (internal quotations omitted).

B. The Seventh Circuit's Holding Is Also At Odds With DOL's Policy Judgment

The decision below is also inconsistent with the position consistently adopted by DOL, both in this case and in other ERISA litigation. In addition to challenging the Seventh Circuit's erroneous interpretation of § 404(c), the Secretary contended that petitioners' allegations stated a claim for fiduciary breach and supported reversal of the district court's decision. *See* DOL Initial Br 23 Moreover, the Secretary argued in her brief on rehearing that petitioners' allegations – namely, that "fiduciaries failed to establish, implement and follow any procedures to prudently determine the reasonableness of the fees and, as a consequence, caused the multi-billion dollar

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[7] *See* Gretchen Morgenson, *Fair Game He Doesn't Let Money Managers Off the Hook*, N Y Times (Apr 11, 2009), *available at* http //www nytimes com/2009/04/12/business/12gret html?_r=2

Plans to pay excessive, retail-level fees" – were not only plausible but "factually supported by materials considered by the panel" DOL Rehearing Br 3. DOL criticized the panel for dismissing petitioners' cognizable allegations "in large part on a mistaken impression that plaintiffs' claims hinge on the fiduciaries' failure 'to scour the market to find and offer the cheapest possible fund'" *Id* at 9-10 [8] DOL also criticized as similarly "mistaken" the Seventh Circuit's "conclusion that the fees were necessarily prudent because the Plans' array of investment funds were offered 'to the general public' at the same expense ratios that the Plans paid." *Id.* at 10 The Secretary's submissions make clear that the decision below runs contrary to the settled views of DOL as the enforcement agency for Title I of ERISA

The Secretary's position in this case is also consistent with her position in other similar ERISA litigation. In *Braden v Wal-Mart Stores, Inc* , No 08-3798 (8th Cir argued Sept 24, 2009), the plaintiffs made substantially the same allegations as petitioners here – that Wal-Mart imprudently chose 10 retail

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[8] Contrary to the Seventh Circuit's mischaracterization, petitioners did not allege that plan fiduciaries must always pick the cheapest fund, rather, they alleged that Deere failed to conduct a diligent and prudent investigation to determine whether the retail mutual funds that were selected charged unnecessarily high fees As discussed herein, DOL has consistently viewed such allegations as stating a viable claim for fiduciary breach under § 404(a) *See also* BNA, *Fiduciary Responsibility Labor Department Official Faults Court for Not Deferring to 404(c) Regulation*, Pension & Benefits Daily (Apr 8, 2009) (statement of DOL official, Timothy Hauser, criticizing *Hecker* and stating that DOL's position is not that fiduciaries must get the "absolute cheapest product," but rather that they must "prudently consider[]" the trade-off between cost of the investment and the value received for that cost)

mutual funds with excessive fees because it failed to "conduct[] an adequate investigation of available fund options, fees and performance," and, moreover, "fail[ed] to use the Wal-Mart Plan's considerable bargaining power, given its massive size, to negotiate better fees for the Plan, instead choosing off-the-shelf products with their relatively higher fees." Br of Sec'y of Labor as *Amicus Curiae* in Support of Plaintiff-Appellant 4, *Braden*, *supra* (filed Mar. 13, 2009) ("DOL *Braden* Br."), *available at* http://www.dol.gov/sol/media/briefs/braden(A)-03-13-2009.pdf. After the district court dismissed the complaint for failure to state a claim, the Secretary filed an *amicus* brief in support of the plaintiffs, in which she argued that the alleged "conduct, if true, would constitute a breach of fiduciary duty under ERISA and would make the responsible fiduciaries liable for any resulting losses." *Id.* at 10; *see id.* at 17-18.[9] Given the substantial similarity between the allegations in the two cases, the Secretary's position in *Braden* also supports reversal in this case.

In sum, the Secretary has taken the consistent position that petitioners' allegations of inadequate investigation and irresponsible refusal to use available bargaining power to obtain lower fees state a cognizable and plausible claim for breach of fiduciary duty under § 404(a) of ERISA, and would, if proven, entitle plaintiffs to recover any financial losses to the plans from the resulting excessive retail-level fees, despite § 404(c). That position represents "the agency's fair and considered judgment on the matter"

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[9] The Secretary's *amicus* brief in *Braden* attempted to distinguish the decision below as a litigation matter, but it did not abandon DOL's disagreement with that decision as a policy matter. *See* DOL *Braden* Br. 19-20 & n.7.

and thus warrants deference from this Court *Auer*, 519 U S. at 462 (deferring to DOL position taken in litigation); *Coke*, 551 U.S at 171 (same) If the Court deems it appropriate to have the Government express its views on the questions presented, petitioners request that the Court call for the views of the Solicitor General Petitioners believe, however, that DOL's past pronouncements make clear that the decision below conflicts with the agency's authoritative interpretation of § 404(a) and § 404(c) of ERISA

III. THIS COURT'S REVIEW IS WARRANTED NOW BECAUSE THE QUESTIONS PRESENTED HAVE ENORMOUS RAMIFICATIONS FOR AMERICAN WORKERS' PENSION PLANS

This Court should grant review of the decision below because it erred on a question of critical importance to American workers regarding the scope of a pension plan fiduciary's obligation to select appropriate investments for the plan The Seventh Circuit's decision is already being used as a blueprint for plan sponsors and administrators throughout the country to avoid ERISA's fiduciary protections against unnecessarily and imprudently high fees. As DOL predicted, these errant fiduciaries argue that, under the decision below, ERISA's fiduciary duties are met merely by including many retail mutual funds with a variety of fees.[10] Because of the tremendous negative impact of management fees on investment returns, the decision below threatens enormous dissipation of American employees' retirement assets In the Seventh Circuit alone, the decision will eviscerate

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[10] *See, e g*, Defs ' Mem in Support of Mot To Dismiss the Am Compl 5, *Loomis v Exelon Corp*, No 06 CV 4900 (N D Ill filed Sept 11, 2009)

fiduciary protections for millions of participants in plans worth hundreds of billions of dollars This case presents an ideal vehicle for this Court to resolve these critical questions

A. The Fiduciary Standard For Selection Of Investment Options Affects Millions Of American Employees Who Have Trillions Of Dollars Invested In ERISA-Governed Pension Plans

Whether a pension plan's fiduciary responsibilities include a duty to obtain lower fees by taking advantage of lower-priced investment options entails tremendous financial consequences for the tens of millions of American workers whose retirement assets are invested in pension plans governed by ERISA As of the first quarter of 2009 (even after the stock market crash of October 2008), American workers had assets of nearly $2 3 trillion in 401(k) plans alone *See U S Retirement Market* at 7 More than half of those 401(k) assets are in plans, such as Deere's, that have more than $500 million in assets and are thus far larger than needed feasibly to invest in institutional investment vehicles, such as institutional mutual funds, rather than higher-priced retail funds. *See* Investment Company Institute, Press Release, *A Number of Factors Impact Retirement Plan Fees, ICI-Deloitte Study Finds Plan Size, Contribution Rates, and Auto Enroll Associated with Lower Fees* (Apr 14, 2009)

As this Court recognized in granting certiorari in *Jones v Harris Associates L P*, 129 S Ct 1579 (2009) (No 08-586), the issue of mutual fund fees has a tremendous effect on the American economy and American investors. Studies have shown that even a small reduction in fees for such large pension plans

can significantly affect an individual's retirement savings over the life of the investment. For instance, one study estimates that the difference in the expense ratio of the typical institutional mutual fund and the typical retail mutual fund – 0 25% – can erode the value of a 401(k) by 6% over the average working life of an American employee *See, e g*, Hewitt Associates, Press Release, *Companies Can Save Millions of Dollars by Suspending Their 401(k) Match for Just One Year, According to New Hewitt Analysis* (Apr. 13, 2009), *see also* Morgenson, *supra* note 7 (noting that pension funds pay an expense ratio of, on average, 0.08% compared to 0 61% for mutual fund shareholders), DOL, *A Look At 401(K) Plan Fees, available at* http://www dol gov/ebsa/publications/401k_employee html (difference of 1% in fees would reduce plan assets by 28% over 35 years) Assuming a 0.25% differential, 401(k) plan participants whose assets are invested in retail mutual funds pay up to $1.2 billion annually in unnecessary fees that could be avoided if plan fiduciaries invested in lower-cost institutional investment options *See* Investment Company Institute, *The Economics of Providing 401(k) Plans· Services, Fees, and Expenses, 2008*, at 3, 9-10 (Aug 2009), *available at* http //www.idc org/pdf/fm-v18n6 pdf A rule that allows pension plan fiduciaries to invest in a range of retail mutual funds without investigating these lower-priced institutional investment vehicles will inflict enormous financial losses on the pension plan assets of tens of millions of American workers *See* DOL Rehearing Br 2 (describing the decision's "far-reaching ramifications").

This Court's immediate review is also critical because the Seventh Circuit's decision effectively exempts a significant proportion of the nation's

employees and retirement assets from ERISA's fiduciary duties of prudent investment selection Forty-seven Fortune 500 companies are headquartered geographically in the Seventh Circuit *See* http://money
cnn com/magazines/fortune/fortune500/2008/full_list/ The pension funds for those companies alone hold more than $125 billion in assets *See* http.//www brightscope.com/ratings Many more American corporations conduct significant business in the Chicago area and are therefore amenable to jurisdiction and venue in the Seventh Circuit The decision below thus directly affects millions of Americans and hundreds of billions of dollars in pension assets.

B. This Case Presents An Ideal Vehicle For Resolving The Important Questions Presented

The Court should not await further percolation of the questions presented in the lower courts. The proper standard for addressing a breach of fiduciary duty claim for imprudent investment selection under § 404(a) of ERISA has now been discussed in the courts of appeals for more than two decades *See supra* pp 23-24 Moreover, three circuits and DOL have considered whether § 404(c)'s safe harbor applies to claims of improper investment selection and have come to opposite conclusions *See supra* pp 14-16 The court below acknowledged its disagreement with DOL and the Fourth Circuit, *see* Pet App 26a, and the district courts are now also divided, *see supra* pp 16-18 These issues are thus ripe for this Court's review Declining to intervene will merely lead to further confusion and inconsistent results in the lower courts

In addition, this case is an ideal vehicle for resolving the questions presented. The Seventh Circuit's dismissal of petitioners' claim under Rule 12(b)(6) creates no jurisdictional questions, and there is no threshold issue that this Court would have to resolve before reaching the questions presented, which raise clean issues of legal interpretation Moreover, if the Seventh Circuit's holdings on the questions presented are reversed, there would be no alternative ground for affirming the district court's dismissal of petitioners' claim of fiduciary breach against Deere Because the Seventh Circuit's dismissal of petitioners' claim rested on rulings of law on which the circuit courts and DOL disagree, the case presents an ideal vehicle for resolution of the questions presented.

IV. IN THE ALTERNATIVE, THE COURT SHOULD HOLD THE PETITION FOR *JONES V. HARRIS ASSOCIATES*

In *Jones v Harris Associates L P.*, No 08-586, this Court granted certiorari to review a decision of a different panel of the Seventh Circuit, holding that, under § 36(b) of the Investment Company Act of 1940, a mutual fund shareholder's challenge to the excessiveness of the fees charged by the investment adviser to the fund could not withstand summary judgment unless the shareholder showed that the investment adviser actively misled the mutual fund's board of directors. Judge Easterbrook's decision for the panel concluded that § 36(b) should be construed narrowly to prevent only deception because the existence of a wide range of mutual funds is adequate "to put competitive pressure on advisory fees " *Jones v. Harris Assocs. L.P* , 527 F 3d 627, 634 (7th Cir 2008) Judge Posner's dissent from denial of rehearing *en banc*, joined by four other active judges, criticized

that assumption as resting on "an economic analysis that is ripe for reexamination," especially given that "[m]utual funds are a component of the financial services industry, where abuses have been rampant." *Jones v Harris Assocs L P*, 537 F.3d 728, 730 (7th Cir. 2008) (dissenting op.)

Both Judge Easterbrook and Judge Posner recognized in *Jones* that there are "substantial advisory fee level differences between equity pension fund portfolio managers and equity mutual fund portfolio managers." *Id* at 731 (dissenting op.) (internal quotations omitted), *accord* 527 F 3d at 634 (panel op.) Judge Posner noted that "advisory fees in the pension field are subject to a marketplace where arm's-length bargaining occurs," but advisory fees for mutual funds are not. 537 F.3d at 731-32 (dissenting op.) (internal quotations omitted) Tellingly, the evidence in *Jones* showed that mutual funds were charged more than double what their investment advisers charged arm's-length institutional investors, like pension funds To the extent this Court also recognizes these market realities, its decision will further support petitioners' claim that, in the pension fund marketplace, plan administrators normally seek lower fees through "arm's-length bargaining" and that Deere's failure to do so violated its fiduciary duties to the plans.

A hold for *Jones* is also appropriate because a reversal in that case will create a "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence v Chater*, 516 U.S 163, 167 (1996) (per curiam) (standard for GVR) The decision below rested on a critical premise – that selecting retail mutual funds was reasonable because

mutual fund fees are "set against the backdrop of market competition" (Pet App 19a) – that is directly at issue in *Jones*. *See* Pet Br 41-44, *Jones*, No 08-586, AARP & CFA *Amicus* Br in Support of Petitioners 13-26, *Jones*, No 08-586 (showing that market competition is ineffective to reduce retail mutual fund fees) If this Court agrees with Judge Posner that market forces are insufficient to hold mutual fund advisory fees to competitive levels, that conclusion necessarily will require reexamination of the *Hecker* court's ruling that Deere's selection of retail mutual funds satisfies ERISA's fiduciary duties because they were "set against the backdrop of market competition" Pet. App 19a.

CONCLUSION

The petition for a writ of certiorari should be granted

Respectfully submitted,

JEROME J. SCHLICHTER
DANIEL V CONLISK
SCHLICHTER, BOGARD & DENTON
100 South Fourth Street
Suite 900
St Louis, Missouri 63102
(314) 621-6115

DAVID C FREDERICK
Counsel of Record
DEREK T. HO
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P L L C
1615 M Street, N W
Suite 400
Washington, D C 20036
(202) 326-7900

October 14, 2009

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 07-3605 & 08-1224

DENNIS HECKER, ET AL.,
Plaintiffs-Appellants,

v

DEERE & COMPANY, FIDELITY MANAGEMENT TRUST CO., AND FIDELITY MANAGEMENT & RESEARCH CO.,
Defendants-Appellees.

Argued Sept 4, 2008
Decided Feb 12, 2009

Before MANION, WOOD, and TINDER, Circuit Judges.

WOOD, Circuit Judge

Even before the stock market began its precipitous fall in early October 2008, litigation over alleged mismanagement of defined contribution pension plans was becoming common This type of litigation received a boost when, in *LaRue v DeWolff, Boberg & Associates, Inc*, --- U S ----, 128 S Ct 1020, 169 L.Ed 2d 847 (2008), the Supreme Court held that "a participant in a defined contribution pension plan [may] sue a fiduciary whose alleged misconduct impaired the value of plan assets in the participant's individual account" 128 S.Ct at 1022 Section 502(a)(2) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U S C. § 1132(a), provides the basis for such an action.

The present case requires us to look further into two questions: first, how broadly does the concept of actionable misconduct sweep, and second, does someone who serves as the manager and investment advisor for a 401(k) plan, or for some of the plan's investment options, owe fiduciary duties to the sponsor's employees These questions arise in a lawsuit brought by some employees of Deere & Company, which sponsors two 401(k) plans relevant to this case Fidelity Management Trust Company ("Fidelity Trust") is the directed and recordkeeper for the Deere plans, it also manages two of the investment vehicles available to plan participants. Fidelity Management & Research Company ("Fidelity Research") is the investment advisor for the mutual funds offered as investment options under Deere's plans

Named plaintiffs Dennis Hecker, Jonna Duane, and Janice Riggins ("the Hecker group"), seeking to sue both on their own behalf and for a class of plan participants, asserted in their second amended complaint ("Complaint") that Deere violated its fiduciary duty under ERISA by providing investment options that required the payment of excessive fees and costs and by failing adequately to disclose the fee structure to plan participants The Hecker group also sued Fidelity Trust and Fidelity Research on the theory that they were functional fiduciaries for the class and thus they too were liable under § 1132(a) All three defendants moved to dismiss for failure to state a claim, see FED.R CIV.P 12(b)(6) The district court concluded that the case could be resolved at that preliminary stage, granted the motions to dismiss without resolving the class certification motion, and entered judgment for the defendants Later, the

court also denied plaintiffs' motion under Rule 59(e) We conclude that the district court correctly found that plaintiffs failed to state a claim against any of the defendants, and we therefore affirm the district court's judgment.

I

A

In 1990, Deere engaged Fidelity Trust to serve as trustee of two of the 401(k) plans ("the Plans") it offers to its employees The Plans, everyone agrees, are subject to ERISA, and the three named plaintiffs are participants in them Under its arrangement with Deere, Fidelity Trust was required to advise Deere on what investments to include in the Plans, to administer the participants' accounts, and to keep records for the Plans

Each Plan offered a generous choice of investment options for Plan participants the menu included 23 different Fidelity mutual funds, two investment funds managed by Fidelity Trust, a fund devoted to Deere's stock, and a Fidelity-operated facility called BrokerageLink, which gave participants access to some 2,500 additional funds managed by different companies Fidelity Research advised the Fidelity mutual funds offered by the Plans Each plan participant decided for herself where to put her 401(k) dollars, the only limitation was that the investment vehicle had to be one offered by the Plan Each fund included within the Plans charged a fee, calculated as a percentage of assets the investor placed with it The Hecker group alleges that Fidelity Research shared its revenue, which it earned from the mutual fund fees, with Fidelity Trust Fidelity Trust in turn compensated itself through those shared fees, rather than through a direct charge to Deere for its services

as trustee. As the Hecker group sees it, this led to a serious – in fact, impermissible – lack of transparency in the fee structure, because the mutual fund fees were devoted not only to the (proper) cost of managing the funds, but also to the (improper) cost of administering Deere's 401(k) plans.

Distressed primarily by the fee levels, the Hecker group filed this suit individually and on behalf of a class against Deere, Fidelity Trust, and Fidelity Research, asserting that all three defendants had breached their duties under ERISA The second amended complaint is the version on which the district court based its ruling Paragraph 11 summarizes the plaintiffs' theory as follows: " . the fees and expenses paid by the Plans, and thus borne by Plan participants, were and are unreasonable and excessive; not incurred solely for the benefit of the Plans and the Plans' participants; and undisclosed to participants By subjecting the Plans and the participants to these excessive fees and expenses, and by other conduct set forth below, the Defendants violated their fiduciary obligations under ERISA."

As we have already noted, Deere appointed Fidelity Trust to be trustee of the Plans Fidelity Trust also performed administrative tasks for the Plans and managed two of the investment options available to the participants. Deere and Fidelity Trust agreed that Deere would limit the selections available to Deere's employees to Fidelity funds, with the exception of the Deere Common Stock Fund and some other minor guaranteed investment contracts. Fidelity Research served as the investment advisor for 23 out of the 26 investment options in the Plans None of the Fidelity Research funds operated exclusively for Deere employees, all were available on the open

market for the same fee The Complaint alleges that Fidelity Research "maintains an active Revenue Sharing program, charging more for its services than it expects to keep in order to have additional monies with which to pay its affiliates and business partners." Those charges, plaintiffs allege, were excessive and unreasonable Deere, in their view, failed to monitor Fidelity Trust's actions properly and failed to keep the participants properly informed

A few more details about the Plans themselves are helpful. One plan was called the Savings & Investment Plan, or SIP, and the other was the Tax Deferred Savings Plan, or TDS For all practical purposes, they operated the same way. Qualified employees could contribute up to a certain amount of their pre-tax earnings, and Deere would match those contributions in varying percentages up to 6%. Deere also made profit-sharing contributions on behalf of some participants All participants were fully vested from the start with respect to their own contributions and were vested after three years' service with respect to the Deere contribution By the end of 2005, the SIP had more than $2 billion in assets. more than $1 3 billion of that was held in Fidelity retail mutual funds. The TDS had more than $500 million in assets by that time, $244 million of which were held in Fidelity retail mutual funds

B

Almost twenty years ago, the Supreme Court observed that "ERISA abounds with the language and terminology of trust law " *Firestone Tire and Rubber Co v Bruch*, 489 U S. 101, 110, 109 S Ct 948, 103 L Ed 2d 80 (1989). The Act's fiduciary responsibility provisions, found at 29 U S.C §§ 1101-14, are central to the Hecker group's case Plaintiffs begin with

§ 1103(c)(1), which says that, except as provided in certain other parts of the statute, "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." Plan fiduciaries must discharge their duties "solely in the interest of the participants and beneficiaries." 29 U.S.C § 1104(a)(1). Section 1104 recognizes an exception to that duty, however, for plans that delegate control over assets directly to the participant or beneficiary. The key language reads as follows

> (c) Control over assets by participant or beneficiary
>
> (1)(A) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary) –
>
> > (i) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and
> >
> > (ii) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control, except that this clause shall not apply in connection with such participant or beneficiary for any blackout period during which the ability of such participant or beneficiary to direct the investment of the assets in his or her account is suspended by a plan sponsor or fiduciary.

29 U.S C. § 1104(c)(1) Finally, the Hecker group relies on 29 U S C § 1105(a), which provides that one fiduciary may be liable for breaches of fiduciary duty committed by another fiduciary under specified circumstances.

C

The district court disposed of the case on the pleadings, as we noted above In evaluating the case, the court had to decide whether the Complaint included "enough facts to state a claim to relief that is plausible on its face." *Khorrami v Rolince*, 539 F.3d 782, 788 (7th Cir 2008) (quoting *Bell Atl Corp v. Twombly*, 550 U.S. 544, 127 S Ct. 1955, 1974, 167 L.Ed.2d 929 (2007)), see *Davis v Indiana State Police*, 541 F.3d 760, 763-64 (7th Cir 2008) Even after *Twombly*, courts must still approach motions under Rule 12(b)(6) by "construi[ing] the complaint in the light most favorable to the plaintiff, accepting as true all well-pleaded facts alleged, and drawing all possible inferences in her favor." *Tamayo v. Blagojevich*, 526 F 3d 1074, 1081 (7th Cir.2008)

Looking first at plaintiffs' claims against Deere, the district court found that the company had complied with all applicable disclosure requirements found in ERISA It saw nothing in the statute or regulations that required Deere to disclose the fact that Fidelity Research was sharing part of the fees it received with its corporate affiliate, Fidelity Trust Materials furnished to plan participants did disclose the expenses actually paid to the fund managers, as plaintiffs implicitly conceded by alleging that the same fees were charged to all retail fund customers. The district court found it unremarkable that those fees included some profit margin for Fidelity Research It also thought it "unlikely" that the fund sponsor (Deere)

would be able to control the way in which the fund manager distributed its profits, particularly among related corporations. The court also noted that there were proposals to amend the regulations so that revenue sharing arrangements would be disclosed See Proposed Rules, Department of Labor, Employee Benefits Security Administration, 71 Fed Reg 41,392, 41,394 (July 21, 2006). This, it thought, made it apparent that the present rules imposed no such obligation Finally, the court rejected the plaintiffs' argument that disclosure was required as a general matter of ERISA law

The Hecker group also asserted that Deere and the Fidelity companies breached their fiduciary obligations by selecting for the Plans investment options with unreasonably high fees ERISA, the court acknowledged, requires a fiduciary to discharge its duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S C. § 1104(a)(1)(B) But (as we already have observed) the statute also provides a "safe harbor" for plans that permit the participant to exercise control over his or her own assets 29 U S.C § 1104(c) Assuming that the "safe harbor" provision establishes an affirmative defense, the court held that the defendants could take advantage of the defense only if the facts asserted in the Complaint established all of its necessary elements, as set forth in 29 C.F R. § 2550.404c-1. It then concluded that the defendants had met that burden, explaining itself as follows:

> Participants could choose to invest in twenty primary mutual funds and more than 2500 others

through BrokerageLink All of these funds were also offered to investors in the general public so expense ratios were necessarily set to attract investors in the marketplace The expense ratios among the twenty primary funds ranges from just over 1% to as low as 07% Unquestionably, participants were in a position to consider and adjust their investment strategy based in part on the relative cost of investing in these funds It is untenable to suggest that all of the more than 2500 publicly available investment options had excessive expense ratios The only possible conclusion is that to the extent participants incurred excessive expenses, those losses were the result of participants exercising control over their investments within the meaning of the safe harbor provision

Last, the district court held that since plaintiffs had failed to state a claim against Deere for breach of fiduciary duty either for failure to disclose or for the selection of investment options, Fidelity could not be held liable either Moreover, it added, neither Fidelity defendant had fiduciary responsibilities with respect to either of the tasks plaintiffs targeted Under the trust agreements, Deere had the sole responsibility for the selection of plan investment funds Thus, even if the Fidelity defendants were fiduciaries for some purposes, they were not fiduciaries for the purpose of making plan investment decisions

After the court dismissed their case, plaintiffs moved for reconsideration under FED R.CIV.P. 59(e), asserting that they had new evidence that would establish (1) the defendants' breach of duty in assessing fees and choosing investment options, (2) the fact that the defendants' failure to provide information about revenue sharing was an independent violation

of ERISA, and (3) the impropriety of the court's evaluating the "safe harbor" defense on a motion to dismiss. Finding nothing new in their arguments or evidence, the court denied the motion. Later, it awarded costs in the amount of $54,396 57 for Deere and $163,814 43 for the two Fidelity defendants. This appeal followed In addition to briefs from the parties, the court has had the benefit of *amicus curiae* briefs filed by the Secretary of Labor (supporting plaintiffs) and by a consortium composed of the ERISA Industry Committee, the National Association of Manufacturers, and the American Benefits Council (supporting defendants)

II

The Hecker group has offered numerous reasons for sending this case back to the district court. For convenience, we have organized the issues as follows: (1) did the district court commit a procedural error warranting reversal by considering documents outside the pleadings; (2) were the Fidelity defendants "functional" fiduciaries of the Plans with respect to the selection of investment options, the structure of the fees, or the provision of information regarding the fee structure; (3) did Deere or the Fidelity defendants breach any fiduciary duties toward plaintiffs, and if so, are they protected by the § 1104(c) affirmative defense, (4) did the district court abuse its discretion in denying plaintiffs' Rule 59(e) motion, and (5) did the court err in its costs award to the defendants, either by giving excessive costs or by including items that are not authorized by 28 U.S C § 1920?

1 Materials Outside Complaint

Deere's motion to dismiss under Rule 12(b)(6) included a number of attached documents seven Summary Plan Descriptions ("SPDs"), two SPD sup-

plements, the Trust Agreement between Fidelity Trust and Deere, and three fund prospectuses that it had retrieved from Fidelity's website. According to plaintiffs, this amounted to some 900 pages of material Fidelity's motion added two more trust agreements to the mix. Plaintiffs objected to the introduction of these documents, arguing that they were "matters outside the pleadings" within the meaning of Rule 12(d), and thus that the court should have converted the two motions into motions for summary judgment The district court, however, found that these were all documents to which the Complaint had referred, that the documents were concededly authentic, and that they were central to the plaintiffs' claim. *See Tierney v Vahle*, 304 F 3d 734, 738 (7th Cir 2002). If the court erred in this respect, we would be able to dispense with most of the rest of this appeal, since it would be necessary to remand on this basis alone

This court has been relatively liberal in its approach to the rule articulated in *Tierney* and other cases *See, e g , Wright v Associated Ins Cos* , 29 F.3d 1244, 1248 (7th Cir.1994) (upholding consideration of an agreement quoted in the complaint and central to the question whether a property interest existed for purposes of 42 U.S.C. § 1983), *Venture Associates v Zenith Data Sys* , 987 F.2d 429, 431 (7th Cir 1992) (admitting letters, to which the complaint referred, that established the parties' contractual relationship), *Ed Miniat, Inc v Globe Life Ins Group, Inc.*, 805 F.2d 732, 739 (7th Cir 1986) (permitting reference to a welfare plan referred to in the complaint in order to decide whether the plan qualifies under ERISA). Plaintiffs see the case of *Travel Over the World v Kingdom of Saudi Arabia*, 73 F.3d 1423

(7th Cir 1996), as a counterexample, but we do not read it that way In *Travel Over the World*, the plaintiffs contested the authenticity of the document that defendants wanted to use, here, they do not. Although they argue that certain statements in the documents are untrue (such as the representation that Deere pays all administrative costs associated with the Plans), the district court took plaintiffs' point of view on all such disputes Deere and the two Fidelity defendants offered the documents only to show what they disclosed to plaintiffs, nothing plaintiffs have argued explains why the documents could not be used in that limited way

For the purpose to which they were put, the SPDs, the SPD supplements, and the Trust Agreement fit within the exception to Rule 12(d)'s general instruction. The Complaint explicitly refers to the SPDs and the Trust Agreement, and both are central to plaintiffs' case: the SPDs reveal the disclosures that Deere made to the Plan participants, and the Trust Agreement throws light on the relationship between Fidelity Trust and Deere. The supplements to the SPDs, while not mentioned separately in the Complaint, serve much the same purpose as the originals. The Complaint did not mention the prospectuses, but these were publicly available documents and thus relevant to the question of disclosure In a similar situation, the Second Circuit held that a court could take notice of a prospectus in a securities fraud case See *I Meyer Pincus & Assocs , P C v Oppenheimer & Co* , 936 F.2d 759, 762 (2d Cir 1991), see also *Menominee Indian Tribe of Wisc v Thompson*, 161 F 3d 449, 456 (7th Cir 1998) (permitting consideration on a motion for judgment on the pleadings under Rule 12(c) of historical papers relating to negotiation of a

treaty with Native American Tribe) Taking into account the limited purpose to which the prospectuses were put here, the district court acted within its discretion when it chose not to convert the defendants' motion under Rule 12(b)(6) to a motion for summary judgment

2 Functional Fiduciaries

Before we delve into the question whether any of the defendants breached a fiduciary duty, we must identify who owed such duties to plaintiffs with respect to the actions at issue here Deere does not contest the fact that it owed some fiduciary duties to the plan participants, it argues instead that plaintiffs have too expansive a concept of its fiduciary responsibilities and, in any event, that it did not breach any fiduciary duty Fidelity Trust and Fidelity Research, in contrast, argue that they were not fiduciaries at all. The Hecker group appears to concede that neither Fidelity entity was a named fiduciary under the Trust Agreement. It argues, however, that one or both of the Fidelity entities functioned as a fiduciary under 29 U S C § 1002(21)(A) In order to find that they were "functional fiduciaries," we must look at whether either Fidelity Trust or Fidelity Research exercised discretionary authority or control over the management of the Plans, the disposition of the Plans' assets, or the administration of the Plans

The Hecker group first argues that Fidelity Trust exercised the necessary control to confer fiduciary status by its act of limiting Deere's selection of funds through the Trust Agreement to those managed by Fidelity Research But what if it did? Plaintiffs point to no authority that holds that limiting funds to a sister company automatically creates discretionary control sufficient for fiduciary status To the con-

trary, as Fidelity points out, there are cases holding that a service provider does not act as a fiduciary with respect to the terms in the service agreement if it does not control the named fiduciary's negotiation and approval of those terms. *Chi Dist Council of Carpenters Welfare Fund v. Caremark, Inc* , 474 F.3d 463 (7th Cir.2007), *Schulist v. Blue Cross of Iowa*, 717 F.2d 1127 (7th Cir 1983). In any event, the Trust Agreement gives Deere, not Fidelity Trust, the final say on which investment options will be included The fact that Deere may have discussed this decision, or negotiated about it, with Fidelity Trust does not mean that Fidelity Trust had discretion to select the funds for the Plans

Plaintiffs retort that, notwithstanding the language of the Trust Agreement, Fidelity Trust exercised *de facto* control over the selection of the funds and Deere rubber-stamped its recommendations That is not, however, what the Complaint alleges. It asserts instead that Fidelity Trust "played a role in the selection of investment options," Complaint ¶ 21, and it concedes that Deere had "final authority," *id* Merely "playing a role" or furnishing professional advice is not enough to transform a company into a fiduciary. *Pappas v Buck Consultants, Inc.*, 923 F 2d 531, 535 (7th Cir 1991), *Farm King Supply, Inc Integrated Profit Sharing Plan & Trust v. Edward D Jones & Co* , 884 F.2d 288, 292 (7th Cir.1989). Many people help develop and manage benefit plans – lawyers and accountants, to name two groups – but despite the influence of these professionals we do not consider them to be Plan fiduciaries This is not a case like *Johnson v Georgia*, 19 F 3d 1184, 1189 (7th Cir. 1994), on which plaintiffs rely, because in that case the fiduciary both managed a defined-benefits plan

and had ultimate authority over the selection of funds Nor do we find plaintiffs' reference to the district court's decision in *Haddock v Nationwide Fin Servs* , 419 F Supp 2d 156 (D Conn 2006), helpful or persuasive, since the service provider in that case had the authority to delete and substitute mutual funds from the plan without seeking approval from the named fiduciary

There is an important difference between an assertion that a firm exercised "final authority" over the choice of funds, on the one hand, and an assertion that a firm simply "played a role" in the process, on the other hand The Complaint on which the Hecker group proceeded made the latter allegation, not the former It gave no notice to the defendants that they would be required to defend on the former basis. For that reason, we reject plaintiffs' tardy effort to present the *de facto* fiduciary argument, and we make no comment on the possible scope of the "functional fiduciary" concept.

Plaintiffs also argue that Fidelity Research, and possibly Fidelity Trust, exercised discretion over the disposition of the Plans' assets by determining how much revenue Fidelity Research would share with Fidelity Trust The Fidelity defendants (with the support in this instance of the Department of Labor) respond that the fees that Fidelity Research collected were not Plan assets under 29 U S C § 1101(b)(1) The fees were drawn from the assets of the mutual funds in question, which, as the statute provides, are not assets of the Plans

> In the case of a plan which invests in any security issued by a [mutual fund], the assets of such plan shall be deemed to include such security but shall

> not, solely by reason of such investment, be deemed to include any assets of such [mutual fund]

Id Once the fees are collected from the mutual fund's assets and transferred to one of the Fidelity entities, they become Fidelity's assets – again, not the assets of the Plans See also *Caremark*, 474 F 3d at 476 n 6

We conclude that the Complaint fails to state a claim against either Fidelity Trust or Fidelity Research based on the supposition that either one is a "functional fiduciary." Plaintiffs' effort to proceed against these companies thus fails at the threshold.

3 Fiduciary Duties and the Safe Harbor Defense

a Violation of Fiduciary Duty

We are thus left with the claim against Deere Plaintiffs' allegations can be distilled into two assertions· (1) Deere breached its fiduciary duty by not informing the participants that Fidelity Trust received money from the fees collected by Fidelity Research, and (2) Deere imprudently agreed to limit the investment options to Fidelity Research funds and therefore offered only investment options with excessively high fees We analyze each claim in turn, beginning with the fee distribution

Critical to plaintiffs' case is the proposition that Deere and Fidelity had a duty to disclose the revenue-sharing arrangements that existed between Fidelity Trust and Fidelity Research. They point to a number of facts in support of their theory From 1991 through 2007, Deere and Fidelity Trust amended their agreement 27 times to add new Fidelity services and products and to adjust the administrative costs that Deere paid up front to Fidelity Trust. Those costs decreased over time, as Fidelity Trust shifted to a

system whereby it recovered its costs from the Deere participants in the same way as it did from outside participants – that is, Fidelity Research would assess asset-based fees against the various mutual funds, and then transfer some of the money it collected to Fidelity Trust

The Hecker group's case depends on the proposition that there is something wrong, for ERISA purposes, in that arrangement The district court found, to the contrary, that such an arrangement (assuming at this stage that the Complaint accurately described it) violates no statute or regulation We agree with the district court Plaintiffs feel misled because the SPD supplements left them with the impression that Deere was paying the administrative costs of the Plans, even though in reality the participants were paying through the revenue sharing system we have described. But, as Deere and Fidelity both point out and the Complaint acknowledges, the participants were told about the total fees imposed by the various funds, and the participants were free to direct their dollars to lower-cost funds if that was what they wished to do The SPD supplements told participants to look to the fund prospectuses for detailed information on fund-level expenses, and the prospectuses in fact furnished that information In its brief, Deere points to the Magellan Fund Prospectus as an example That prospectus broke down the Fund's total annual operating expenses paid from fund assets (0 59%) as follows management fee, 0 39%; distribution or service fees, none; other expenses, 0 20%

The fact that there were no *additional* fees borne by Deere is immaterial. While Deere may not have been behaving admirably by creating the impression that it was generously subsidizing its employees'

investments by paying something to Fidelity Trust when it was doing no such thing, the Complaint does not allege any particular dollar amount that was fraudulently stated. How Fidelity Research decided to allocate the monies it collected (and about which the participants were fully informed) was not, at the time of the events here, something that had to be disclosed. It follows, therefore, that the Hecker group failed to state a claim against Deere based on the revenue-sharing arrangement and the lack of disclosure about it

These conclusions go a long way toward disposing of plaintiffs' claims that the non-disclosure of the revenue-sharing breached the general fiduciary duty imposed on Deere by 29 U S C § 1104(a)(1). Before such a violation can be found, there must be either an intentionally misleading statement, see *Varity Corp v. Howe*, 516 U.S. 489, 505, 116 S.Ct 1065, 134 L.Ed.2d 130 (1996), or a material omission, see *Anweiler v. American Elec. Power Serv Corp* , 3 F.3d 986, 992 (7th Cir.1993) The Complaint does not allege that the representation in the SPD supplement – that Deere paid the administration expenses for the Plans – was an intentional misrepresentation To the contrary, plaintiffs have since submitted evidence with their Rule 59(e) motion showing that Deere believed that Fidelity Trust's services were free.

The only question is thus whether the omission of information about the revenue-sharing arrangement is material Deere disclosed to the participants the total fees for the funds and directed the participants to the fund prospectuses for information about the fund-level expenses. This was enough. The total fee, not the internal, post-collection distribution of the

fee, is the critical figure for someone interested in the cost of including a certain investment in her portfolio and the net value of that investment Plaintiffs argue that some investors may have expected better management from a fund with a higher fee, but, as the Magellan Fund Prospectus illustrates, participants had access to information about management expenses as a percentage of fund assets. The later distribution of the fees by Fidelity Research is not information the participants needed to know to keep from acting to their detriment See *Bowerman v. Wal-Mart Stores, Inc* , 226 F 3d 574, 589-91 (7th Cir.2000) The information is thus not material, and its omission is not a breach of Deere's fiduciary duty

We turn next to plaintiffs' contention that Deere violated its fiduciary duty by selecting investment options with excessive fees In our view, the undisputed facts leave no room for doubt that the Deere Plans offered a sufficient mix of investments for their participants. Thus, even if, as plaintiffs urge, there is a fiduciary duty on the part of a company offering a plan to furnish an acceptable array of investment vehicles, no rational trier of fact could find, on the basis of the facts alleged in this Complaint, that Deere failed to satisfy that duty As the district court pointed out, there was a wide range of expense ratios among the twenty Fidelity mutual funds and the 2,500 other funds available through BrokerageLink At the low end, the expense ratio was 07%, at the high end, it was just over 1% Importantly, all of these funds were also offered to investors in the general public, and so the expense ratios necessarily were set against the backdrop of market competition. The fact that it is possible that some other funds might have had even lower ratios is beside the point,

nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund (which might, of course, be plagued by other problems)

As for the allegation that Deere improperly limited the investment options to Fidelity mutual funds, we find no statute or regulation prohibiting a fiduciary from selecting funds from one management company. A fiduciary must behave like a prudent investor under similar circumstances; many prudent investors limit themselves to funds offered by one company and diversify within the available investment options As we have noted several times already, the Plans here directly offered 26 investment options, including 23 retail mutual funds, and offered through BrokerageLink 2,500 non-Fidelity funds We see nothing in the statute that requires plan fiduciaries to include any particular mix of investment vehicles in their plan. That is an issue, it seems to us, that bears more resemblance to the basic structuring of a Plan than to its day-to-day management Compare *Hughes Aircraft Co v. Jacobson*, 525 U.S. 432, 443-44, 119 S Ct 755, 142 L Ed 2d 881 (1999), *Lockheed Corp v Spink*, 517 U.S. 882, 890, 116 S Ct 1783, 135 L Ed.2d 153 (1996) We therefore question whether Deere's decision to restrict the direct investment choices in its Plans to Fidelity Research funds is even a decision within Deere's fiduciary responsibilities On the assumption that it is, however, we nonetheless conclude that taking the allegations in the Complaint in the light most favorable to plaintiffs, no breach of a fiduciary duty on Deere's part has been described.

b Safe Harbor Defense

Even if we have underestimated the fiduciary duties that Deere had to its plan participants, the district court's judgment in favor of the defendants must stand if that court correctly decided that the safe harbor provided in 29 U.S C § 1104(c) is available to them This was the ground on which the district court primarily relied. If the defense is available, it provides an alternate ground for affirmance

Although ERISA normally imposes a fiduciary duty on plan managers, the statute modifies that rule for plans that provide for individual accounts and allow a participant or beneficiary "to exercise control over the assets in his account" 29 U S C § 1104(c)(1) First, the participant must have the right to exercise independent control over the assets in her account and in fact exercise such control Next, the participant must be able to choose "from a broad range of investment alternatives." 29 C.F R § 2550 404c-1(b)(1)(ii) As we noted in *Jenkins v Yager*, 444 F 3d 916 (7th Cir 2006), "prominent among [the conditions a plan must meet] is that it must provide at least three investment options and it must permit the participants to give instructions to the plan with respect to those options at least once every three months 29 C F R § 2550 404c-1(b)(2)(c)" 444 F 3d at 923 Third, the participant must be given or have the opportunity to obtain "sufficient information to make informed decisions with regard to investment alternatives available under the plan." 29 C F.R. § 2550 404c-1(b)(2)(i)(B) The regulation sets forth nine criteria that must be met before the participant may be considered to have sufficient investment information *Id* Those criteria call for such things as clear labeling of the plan as § 1104(c) instrument, a description of the investment alternatives available,

identification of designated investment managers, explanation of how to give investment instructions, a description of "any transaction fees and expenses which affect the participant's . . . balance in connection with purchases or sales of interests," *id* § 2550 404c-1(b)(2)(i)(B)(1)(v), relevant names and addresses of plan fiduciaries, special rules for employer securities, special rules for investment alternatives subject to the Securities Act of 1933, and materials related to voting, tender, or other rights incidental to the holdings in the account Other parts of the regulation emphasize that the fiduciary must furnish extensive information on the operating expenses of the investment alternatives, copies of relevant financial information, and other similar materials. *Id.* § 2550.404c-1(b)(2)(i)(B)(2).

The regulation does not require plans to offer only cost-free investment vehicles. It recognizes that a plan "does not fail to provide an opportunity for a participant or beneficiary to exercise control over his individual account merely because it . imposes charges for reasonable expenses" *Id* § 2550.404c-1(b)(2)(ii)(A) Procedures must be in place, however, to inform participants of the actual expenses incurred with respect to their individual accounts *Id* Other parts of the regulation address the required frequency of investment instructions. Finally (for our purposes), the regulation provides that independent control will not be found if a plan fiduciary has concealed material non-public facts regarding the investment from the participant or beneficiary. *Id.* § 2550 404c1(c)(2)(ii)

The regulation sums up the effect of a finding of independent exercise of control, from the perspective of a plan fiduciary, as follows

> If a participant or beneficiary of an ERISA section 404(c) plan exercises independent control over as-sets in his individual account in the manner described in paragraph (c), then no other person who is a fiduciary with respect to such plan shall be liable for any loss, or with respect to any breach of part 4 of title I of the Act, that is the direct and necessary result of that participant's or beneficiary's exercise of control

Id. § 2550 404c-1(d)(2)(i) The safe harbor provided by § 1104(c) is an affirmative defense to a claim for breach of fiduciary duty under ERISA *In re Unisys Sav Plan Litig* , 74 F 3d 420, 446 (3d Cir.1996)

Although normally a district court should not base a dismissal under Rule 12(b)(6) on its assessment of an affirmative defense, see *U.S Gypsum Co v Indiana Gas Co* , 350 F.3d 623, 626 (7th Cir 2003), that rule does not apply when a party has included in its complaint "facts that establish an impenetrable defense to its claims" *Tamayo v Blagojevich*, 526 F 3d 1074, 1086 (7th Cir 2008). In *Tamayo*, we went on to explain that "[a] plaintiff pleads himself out of court when it would be necessary to contradict the complaint in order to prevail on the merits . . . If the plaintiff voluntarily provides unnecessary facts in her complaint, the defendant may use those facts to demonstrate that she is not entitled to relief" *Id.* (internal citations and quotation marks omitted)

Plaintiffs here chose to anticipate the § 1104(c) defense in their Complaint explicitly and thus put it in play Paragraph 58 begins by noting that "ERISA § 404(c) provides to Plan fiduciaries a 'Safe Harbor' from liability for losses that a participant suffers in his or her 401(k) accounts to the extent that the participant exercises control over the assets in his or her

401(k) accounts." Paragraphs 58 through 61 describe the information that Deere, as a plan fiduciary, was required to furnish Later, the Complaint has a section entitled "Defendants' Non-Compliance with § 404(c)'s Safe Harbor Requirements and Concealment of Its Fiduciary Breaches" Paragraphs 91 through 101 specify exactly what Deere and Fidelity allegedly failed to do For example, paragraphs 91 and 100(c) and (e) accuse them of failing to disclose that Fidelity was engaged in revenue sharing among its different entities Paragraphs 93 and 100(b) assert that Plan participants did not have complete knowledge of the fees and expenses that were being charged to the Plans and that were reducing their account balances Paragraphs 95 and 101(i) charge, among other things, that Deere and Fidelity failed to disclose their agreement that Deere would offer only Fidelity-related funds for the Plans The district court concluded that the Complaint so thoroughly anticipated the safe-harbor defense that it could reach that issue; we agree with it, bearing in mind that we must still consider any factual allegations in the light most favorable to plaintiffs

The Hecker group argues that even if the Complaint anticipated the safe-harbor defense, further proceedings are needed because the Complaint did not address all of the 25 or so different requirements that must be met in order to establish it definitively. Deere implies that this overstates the number of requirements, but its primary point is that plaintiffs have waived the right to complain about the Plans' compliance with all but two criteria – the obligation to disclose fund-level fees and the level of expenses (see 29 C F R §§ 2550.404c-1(b)(2)(i)(B)(1)(v) and (B)(2)(i)) In some instances, it is inappropriate to

jump to the conclusion that a point has been waived when a case is being decided on the pleadings, but this is not such a case. Plaintiffs chose to discuss § 1104(c) extensively in the Complaint and to specify the ways in which the Plans fell short for purposes of the defense To shift grounds now would undermine the notice that defendants gleaned from the Complaint, to their prejudice

Restricting our analysis to the challenges in the Complaint, we see no plausible allegation that the Plans do not comply with § 1104(c) Plaintiffs have focused on matters that are not helpful to them in the end, namely, the defendants' failure to disclose non-public material information, their revenue-sharing arrangements, and their decision to offer only Fidelity Research mutual funds As we have already noted, however, the regulations implementing the safe-harbor defense describe in detail the expenses and fees that must be disclosed The fee distribution by the management company post-collection is not one of those fees See 29 C F R §§ 2550.404c1(b)(2)(i)(B)(1)(v), (2)(i) And, as we have already explained, the revenue-sharing arrangement between the Fidelity defendants is not material information for a participant's investment decision The central question is thus whether the alleged misconduct – the imprudent selection of mutual funds with excessively high fees – falls within the safe harbor

Plaintiffs begin with a broadside attack, asserting that the defense has no application to a fiduciary's "assembling an imprudent menu [of investment options] in the first instance." *DiFelice v U S Airways, Inc* , 497 F.3d 410, 418 n. 3 (4th Cir.2007) Deere and Fidelity respond that there are no exceptions to

§ 1104(c)'s safe harbor, which in terms applies to "any" breach committed by someone "who is otherwise a fiduciary." Pinning their hopes on a footnote to the preamble to the implementing regulations, see 57 Fed Reg 46906-01, 46, 924 n 27 (Oct 13, 1992), plaintiffs argue that the Secretary has carved out the activity of designating investment options from the safe harbor Fidelity and Deere respond that this type of informal commentary, which was never embodied in the final regulations, cannot override the language of the statute and regulations

Plaintiffs would like us to decide whether the safe harbor applies to the selection of investment options for a plan, but in the end we conclude that this abstract question need not be resolved to decide this case Even if § 1104(c) does not always shield a fiduciary from an imprudent selection of funds under every circumstance that can be imagined, it does protect a fiduciary that satisfies the criteria of § 1104(c) and includes a sufficient range of options so that the participants have control over the risk of loss. *Cf Langbecker v. Electronic Data Sys Corp* , 476 F.3d 299, 310-11 (5th Cir.2007), and *Unisys*, 74 F 3d at 445 (holding that a fiduciary that committed a breach of duty in making an investment decision for a Plan may nevertheless take advantage of the § 1104(c) defense), but see *DiFelice*, 497 F 3d at 418 n 3 The regulation addresses the investment options by stipulating that the § 1104(c) defense is available only if the plan offers "a broad range of investment alternatives." 29 C F.R § 2550.404c-1(b)(3) The necessary broad range exists "only if the available investment alternatives are sufficient to provide the participant or beneficiary with a reasonable opportunity to" accomplish three goals: the abil-

ity materially to affect potential return and degree of risk in the investor's portfolio, a choice from at least three investment alternatives each of which is diversified and has materially different risk and return characteristics, and the ability to diversify sufficiently so as to minimize the risk of large losses *Id* §§ 2550 404c1(b)(3)(i)(A)-(C)

Interestingly, in light of the inclusion of the BrokerageLink facility in the plans available to the Deere participants, the regulation also notes that "[w]here look-through investment vehicles are available as investment alternatives to participants and beneficiaries, the underlying investments of the look-through investment vehicles shall be considered in determining whether the plan satisfies the requirements of [the regulation] " *Id* § 2550.404c-1(b)(3)(ii). The 2,500 mutual funds available through BrokerageLink had fees ranging from 07% to 1% Any allegation that these options did not provide the participants with a reasonable opportunity to accomplish the three goals outlined in the regulation, or control the risk of loss from fees, is implausible, to use the terminology of *Twombly* Plaintiffs complain that non-Fidelity funds were available only through BrokerageLink, but that is immaterial under this regulation If particular participants lost money or did not earn as much as they would have liked, that disappointing outcome was attributable to their individual choices Given the numerous investment options, varied in type and fee, neither Deere nor Fidelity (assuming for the sake of argument that it somehow had fiduciary duties in this respect) can be held responsible for those choices

4 Rule 59(e) Motion to Alter or Amend

After the district court entered judgment, the Hecker group filed a timely motion under FED.R CIV.P. 59(e) in which it argued that newly discovered evidence supported relief in the group's favor This evidence, plaintiffs asserted, revealed that Deere did turn over all relevant decisionmaking power to Fidelity and allowed Fidelity to decide such critical matters as what funds to include in the Plans, how much to pay Fidelity Trust (as Trustee), what administrative fees were being assessed against the Plans or charged to participants, and how to allocate the float from interest on Plan assets The district court denied the motion, finding that it was really an untimely request to amend the Complaint, that plaintiffs had not proffered an amended complaint, and that they had not shown how the new evidence altered any of the court's legal conclusions

At the outset, it is not even clear that the proffered evidence is new Fidelity argues that it is not, because plaintiffs possessed the evidence before the district court ruled on the motion to dismiss Plaintiffs concede that point, but they assert that it is "new" in the sense that they received it only after the due date for briefs on the motion That may be so, but if this evidence was so important to their case, plaintiffs should have alerted the district court to their discovery and asked for some appropriate way to bring it to the court's attention There was no reason to sit on potentially relevant evidence and allow the court to go forward with its decision, and then turn around and criticize the court for ruling without the benefit of that same evidence

That is why this court has held that the assessment of newness turns on the date of the court's

dispositive order, not on the date when the motions or briefs are filed *In re Prince*, 85 F 3d 314, 324 (7th Cir 1996) Plaintiffs admit that their experts analyzed the evidence, and the expert reports were exchanged on June 6, 2007, the district court did not rule until June 21, 2007

Plaintiffs also argue that the district court should not have penalized them for failing to proffer an amended complaint, on the theory that a plaintiff can amend a complaint only after the court grants the Rule 59(e) motion The last point may be true, but it does not address the question whether plaintiffs must *show* the district court what they propose to do Once judgment has been entered. there is a presumption that the case is finished, and the burden is on the party who wants to upset that judgment to show the court that there is good reason to set it aside Thus, in *Twohy v First Nat'l Bank*, 758 F 2d 1185 (7th Cir 1985), this court upheld the rejection of a Rule 59(e) motion because the plaintiff did not attach an amended complaint and did not indicate the "exact nature of the amendments proposed" *Id* at 1189; see also *Vicom, Inc. v Harbridge Merchant Servs* , 20 F.3d 771, 785 (7th Cir.1994) (faulting plaintiff for not attaching a proposed complaint or specifically informing the court how it would cure deficiencies in the earlier complaint) We see no abuse of discretion in this aspect of the district court's decision

Finally, the new evidence would not have changed the case against Deere, as the district court observed The court had already approached the case on the assumption that Deere had been imprudent in its selection of investment options. Although the new evidence can be read to disclaim the admission that

Deere had the final word on those selections and to give notice that the plaintiffs' theory was that Fidelity was the true actor (and thus the functional fiduciary), the district court was within its discretion to reject this late shift in focus – a shift that would have been highly prejudicial to the defendants

5. Costs Award

We can be brief with respect to the costs order The district court awarded costs to both Deere and Fidelity, and plaintiffs challenge both awards. First, we address Deere's costs Deere requested $74,335 52 in costs, and the court awarded it $54,396 57. Plaintiffs quibble about such matters as the number of copies the district court thought reimbursable and the documentation for those copies, but we see no abuse of discretion in the district court's evaluation of those matters The only potential problem lies with the copies that Deere admits were made for its own records We have held that the cost of copies made by an attorney for his or her own records is not recoverable *McIlveen v Stone Container Corp.*, 910 F.2d 1581, 1584 (7th Cir 1990). On the other hand, we have also upheld a cost award to a party for copies made "for its attorneys." *Northbrook Excess & Surplus Ins Co v Procter & Gamble Co* , 924 F 2d 633, 643 (7th Cir.1991) This is not an argument, however, that plaintiffs have made, and we are reluctant in the face of apparently conflicting decisions from this court to reach out and decide it on our own Because of the plaintiffs' forfeiture of this potential legal argument and the lack of merit in plaintiffs' other challenges to the Deere costs order, we affirm that order (We take no position on the issue we have flagged; there will be time enough in a case in which it is properly presented to resolve it)

Fidelity asked for $186,488 95 in costs, and the court awarded it $164,814 43. While this is a substantial amount, we see no abuse of discretion in the district court's decision. Plaintiffs' principal complaint is that it was improper to award Fidelity its costs for document selection, as opposed to document processing Fidelity responds that the costs were for converting computer data into a readable format in response to plaintiffs' discovery requests, such costs are recoverable under 28 U S C § 1920 The record supports Fidelity's characterization of the costs, and so we will not disturb the district court's order

The judgment of the district court is AFFIRMED

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

No 06 C 719 S

DENNIS HECKER, JONNA DUANE AND JANICE RIGGINS, INDIVIDUALLY AND ON BEHALF OF THOSE SIMILARLY SITUATED,
Plaintiffs,

v

DEERE & COMPANY, FIDELITY MANAGEMENT TRUST COMPANY, AND FIDELITY MANAGEMENT & RESEARCH COMPANY,
Defendants.

June 21, 2007

MEMORANDUM AND ORDER

SHABAZ, District Judge

Plaintiffs Dennis Hecker, Jonna Duane and Janice Riggins commenced this class action alleging that defendant's Deere & Company, Fidelity Management Trust Company (Fidelity Trust), and Fidelity Management and Research Company (Fidelity Research) breached their fiduciary duties under the Employee Retirement and Income Security Act (ERISA) in the payment and non-disclosure of certain fees paid for the management of employee retirement funds The Court has jurisdiction pursuant to 28 U S.C. § 1331. The matter is presently before the Court on defendants' motions to dismiss plaintiffs' second amended complaint The following is a summary of relevant

facts as alleged or referenced in the second amended complaint.

FACTS

Defendant Deere, a heavy equipment manufacturer, sponsors personal savings plans (401(k) plans) for its employees Defendant is also the administrator of the 401(k) plans Pursuant to the 401(k) plans employees may contribute part of their pre-tax earnings to the plan and defendant Deere will match the contributions up to a certain percentage. The funds are invested in various investment options presented by the plan and chosen by the employee More than $2 5 billion is invested by employees in the Deere 401(k) plans. Plaintiffs are participants in the 401(k) plans

In 1990 defendants Deere and Fidelity Trust entered into an agreement in which Fidelity Trust agreed to act a trustee for the 401(k) plans, to perform record keeping and other administrative tasks for the plans As plan administrator Deere has final authority to select investment options for the plans. Deere's role in selecting funds is described in the relevant Summary Plan Descriptions (SPDs) as follows

Who are the plan administrators and what functions do they perform?

> The authority to control and manage the operation and manage the operation and administration of the Plan is vested in [Deere] As administrator of the Plan, [Deere] has, among other powers, the right to (vi) maintain records concerning the Plan and make arrangements with the trustee to maintain accounts and proper statements.

All contributions to the Plan are held by the trustee, [Fidelity Trust], acting under a trust agreement dated December 1, 1990. The Trustee's primary responsibilities are to (i) hold and invest the Plan assets in trust among several investment options selected by [Deere] and as directed by Plan participants and (ii) perform certain ministerial record-keeping functions.

What fees and charges may participants in the Plan be subject to?

The costs of administering the Plan are paid by the Company. Participants incur no transaction fees or sales loads on funds purchased and sold through the Plan's standard plan options .... All fund investors indirectly pay any fund-level expenses, such as management fees, asset-based sales charges (12b-1 fees), and other fund expenses, as detailed in the fund's prospectus .

Deere agreed with Fidelity Trust that Deere would limit its selection of investment options to investment funds offered by defendant Fidelity Research for which Fidelity Research was investment advisor ("Fidelity Funds"). Fidelity Funds are marketed to investors throughout the United States through various commercial outlets Presently, 23 of the 26 investment options available to the 401(k) plan participants are Fidelity Funds Fidelity Trust and Fidelity Research are both subsidiaries of Fidelity Investments

Defendant Fidelity Trust is compensated in part for its duties as trustee by direct payment from defendant Deere. Government filings made on behalf of

the plans represent that the Plans themselves make no direct payment to defendant Fidelity Trust

Each of the funds for which defendant Fidelity Research is investment advisor charge fund investors an asset-based fee The fee, expressed as a percentage of total dollars invested in a particular fund, varies from fund to fund Of the 20 primary options offered, fees range from 07% for the Spartan Fund (which replicates the S & P 500) to 1.01% for the Diversified International Fund The total fee, expressed as a percentage of assets invested, is set forth in each fund prospectus, further itemized between management fee, service fee and other expenses. Additionally, the plans offer an investment alternative called BrokerageLink which permit participants to invest in over 2500 different publicly available mutual funds from Fidelity and broker mutual fund companies.

As the total amount of money invested in the funds grows, the fees grow Fidelity Research shares some of the fee revenue it receives with Fidelity Management The fact and the amount of this revenue sharing of asset-based revenue is not known to defendant Deere or disclosed to plan participants The Fidelity Funds available in the plan are the same funds, and charge the same asset-based fees, as those made available to large and small investors in the retail market for investment funds Defendant Deere could have negotiated lower fees with Fidelity Research, or could have selected different funds from different providers with lower rates but has made no effort to do so

MEMORANDUM

The second amended complaint, distilled to the actual causes of action, alleges that the defendants violated their fiduciary duties to plan participants in two ways by providing investment options with excessive and unreasonable fees and costs, and by failing to adequately disclose information about the fees and costs to plan participants Defendant Deere moves to dismiss the complaint on the basis that its disclosures were fully compliant with ERISA requirements and that any claim based on the amount of the total fees is foreclosed by ERISA's safe harbor provision, 29 U.S C. § 1104(c) Defendant Fidelity Trust moves to dismiss the claims against it on the basis that the claims do not relate to its limited fiduciary role and defendant Fidelity Research contends that it is not a fiduciary.

A complaint should be dismissed for failure to state a claim only if it appears beyond a reasonable doubt that the plaintiffs can prove no set of facts in support of the claim which would entitle the plaintiffs to relief *Conley v Gibson*, 355 U S 41, 45-46, 78 S Ct 99, 2 L.Ed 2d 80 (1957) In order to survive a challenge under Rule 12(b)(6) a complaint "must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory " *Car Carriers, Inc v Ford Motor Co.*, 745 F 2d 1101, 1106 (7th Cir 1984)

Initially, plaintiffs oppose the motions to dismiss on the grounds that they are based in part on Summary Plan Descriptions (SPDs) and prospectuses which are not attached to the complaint and therefore not properly considered on a motion to dismiss. Documents not attached to the complaint may be considered if they are referred to in the compliant,

are concededly authentic and are central to the plaintiff's claim *Tierney v Vahle*, 304 F 3d 734, 738 (7th Cir.2002) The point of the exception is to limit a plaintiff's ability to evade dismissal by failing to attach an important document that proves plaintiff's claims lack merit *Id* Both the exception and its purpose are applicable here The complaint is based on the terms of the plans and the alleged inadequacy of disclosures to participants. Accordingly, the plan documents, the SPDs, and the prospectuses which are referenced in the SPDs are central to the claim and form the basis for the complaint The prospectuses, in addition to being fundamental to the complaint are widely circulated publicly available documents There is no dispute concerning the authenticity of any of them.

Although many of the allegations are derived from the documents, they have not been attached to the complaint in an apparent effort to evade assessment of the legal merits of the claims on a motion to dismiss Far from a short and plain statement of claims as contemplated by Rule 8, the complaint is a rambling 38 page collection long on legal argument, public policy rhetoric and repetition, but vague in its allegations of facts which might be relevant to the claims alleged. Under the circumstances it is appropriate to consider them as part of the complaint on a motion to dismiss

Adequacy of Disclosure

Defendant Deere moves to dismiss the claims contending that the allegations and plan documents establish as a matter of law that it has fully complied with the applicable ERISA disclosure provisions Plaintiffs dispute compliance and further argue that

additional disclosure is required based on Deere's general fiduciary obligations

The following provisions of title 29 of the United States Code are relevant.

§ 1021(a) Summary plan description and information to be furnished to participants and beneficiaries

The administrator of each employee benefit plan shall cause to be furnished in accordance with section 1024(b) of this title to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan –

(1) a summary plan description described in section 1022(a)(1) of this title, and

(2) The information described in sections 1024(b)(3) and 1025(a) and (c) of this title

§ 1023(b) Financial statement

An annual report under this section shall include a financial statement containing the following information

(2) With respect to an employee pension benefit plan: a statement of assets and liabilities, and a statement of changes in net assets available for plan benefits which shall include details of revenues and expenses and other changes aggregated by general source and application

§ 1024(b) Publication of Summary Plan Description and annual report to participants and beneficiaries of plan

> Publication of the summary plan description and annual reports shall be made to participants and beneficiaries of the particular plan . [w]ithin 210 days after the close of the fiscal year of the plan, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, a copy of the statements and schedules described in [§ 1023(b)] . . .

29 C.F R § 2520 104b-10(d)(3) prescribes the form of the annual report relevant to expenses as follows

> Plan expenses were ($) These expenses included ($) in administrative expenses and ($) in benefits paid to participants and beneficiaries, and ($) in other expenses

The second amended complaint alleges that defendants failed to disclose the fact that Fidelity Research shared part of the fees it received with its corporate sibling, Fidelity Trust Nothing in the statute or regulation directly requires such a disclosure. Plaintiffs contend that failure to disclose the transfer renders the existing disclosures inaccurate because a portion of the expenses reported as incurred for fund management was actually used for trustee administrative expenses The statute and regulations cannot be reasonably read to require this type of disclosure for several reasons, particularly under the circumstances here

The disclosure in the reports and prospectuses accurately reflect the expenses actually paid to the fund manager for fund management as evidenced by the allegations that the same fees are charged to all

retail fund customers To the extent that the charge includes profit, it is unlikely that the fund sponsor would know or be in a position to control its redistribution among related corporations, a fact conceded in defendants' brief There is no evidence of intent in the statute or regulations to reach this type of detail. Moreover, recent proposals to amend the regulations, *see* 71 Fed Reg 41,392, 41,394, to require revenue sharing disclosures in annual reports make it apparent that present regulations do not require it These proposals for regulatory change originated in the ERISA Advisory Counsel *Report of the Working Group on Plan Fees and Reporting on Form 5500*, http //www.dol gov/ebsa/publications/AC_111804_ report html, a document relied upon by both parties

The report examines the nature of the revenue sharing and its effect on the adequacy of expense disclosure for 401(k) plans as presently required by ERISA regulations:

> Currently the Form 5500 fee reporting requirements do not meet the Department of Labor's objectives with regard to the data collected There are numerous pooled investment vehicles in which the fees are intrinsic to the underlying investment and are not reported to (or known by) the plan sponsor nor reported on Form 5500 Additionally, fees paid to plan service providers such as record keepers and trustees out of these asset-based fees, in the form of revenue sharing, sub-transfer agency fees, 12(b)(1) fees or the like are not reported on Form 5500 or the accompanying Schedules While some more sophisticated plan sponsors are cognizant of the overall fees, both explicit and embedded, as well as the revenue sharing arrangements between various providers, many plan sponsors

simply do not understand the total fees paid to service providers, nor the revenue streams between them The fiduciary responsibility provisions of ERISA require that plan sponsors know the amount of fees paid in relationship to the services provided and to understand the revenue sharing arrangements between plan providers. Therefore, the Department of Labor should consider amending the Form 5500 and the accompanying Schedules and, through its rule-making authority, solicit the input from the industry as to the appropriate methodology for capturing that information In particular, the Department of Labor may wish to consider use of a proxy in order to estimate total fees in light of the significant difficulties of capturing exact information at the plan level The Department of Labor may also wish to modify its existing worksheet for plan sponsors in order to provide a tool to help plan sponsors understand the true nature of the non-explicit fees and revenue sharing arrangements among the plan's providers prior to choosing the provider or an investment option.

Executive Summary at pp 3-4

A review of the report confirms that the revenue sharing issue raised by plaintiffs' complaint is a matter of policy concern within the Department of Labor. It also unequivocally confirms that present regulations do not require disclosure of the information *See* particularly the report's Recommendations for Regulatory Change at p 8 Whether, as a policy matter, additional reporting of revenue sharing arrangements should be required, it is not presently required and failure to include such information does not violate existing ERISA standards for disclosure.

Accordingly, defendants' failure to so disclose is not a violation of the present statute or regulations and does not state a claim for breach of the duty of disclosure

There is no merit to plaintiffs' contention that disclosure not required by the statutory disclosure requirements is separately required by the general ERISA fiduciary obligations Disclosure requirements are generally limited to those expressly prescribed by the statutory language of ERISA. *Ames v American Nat. Can Co* , 170 F.3d 751, 759 (7th Cir 1999). Even the case relied upon by plaintiffs, *Jordan v. Federal Express Corp.*, 116 F 3d 1005 (3d Cir.1997), confirms that while Courts have latitude to develop the meaning of general fiduciary duties, that latitude is limited as applied to disclosure obligations "Because the statutory disclosure and reporting requirements and remedies were carefully considered and described by Congress, we required a showing of 'extraordinary circumstances' for a participant to receive an equitable remedy under § 502(a)(3) " *Id.* at 1013 Where as here Congress has by statute and related regulation, created detailed rules governing disclosure requirements, it would be inappropriate to ignore and augment them using the general power to define fiduciary obligations

The second amended complaint does not state a claim based on the failure to comply with ERISA's disclosure requirements.

Failure to Provide Lower Fee Investment Choices

The second amended complaint also alleges that defendants breached their fiduciary obligations by selecting and offering investment options with unreasonably high fees for the 401(k) plans. ERISA requires that a fiduciary must discharge its duties with

the care, skill, prudence and diligence of a prudent man. 29 U S C § 1104(a)(1)(B). It also provides a "safe harbor" from liability for breaches of fiduciary duties under limited circumstances in 29 U S C § 1104(c)·

> (1) In the case of a pension plan which provides for individual accounts and permits a participant of beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)
>
> (B) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control

Defendants move to dismiss the claim on the basis that the safe harbor applies Initially, plaintiffs oppose the motion on the basis that consideration of the defense is inappropriate on a motion to dismiss Alternatively, plaintiffs contend that the safe harbor is unavailable because defendants have not complied with the regulatory disclosure requirements and, more fundamentally, because plaintiffs alleged losses do not stem from any exercise of control by them

Although plaintiffs did so in the second amended complaint, they were under no obligation to allege facts which would overcome an anticipated affirmative defense *U.S Gypsum Co v Indiana Gas Co , Inc* , 350 F 3d 623, 626 (7th Cir.2003) However, a motion to dismiss may be based on a defense provided that the allegations of the complaint (and as discussed above, documents deemed to be part of the complaint) establish all the ingredients of the defense. *Id* Accordingly, defendants may prevail on the motion to dismiss based on the 29 U S C § 1104(c)

safe harbor, but only if the facts of the complaint establish all the elements of the defense

In order to qualify for safe harbor treatment defendants must have complied with the requirements of 29 C F R § 2550.404c-1. There is no dispute that the facts alleged establish all criteria except for the following provisions relating to expense disclosure:

> (v) A description of any transaction fees and expenses which affect the participant's or beneficiary's account balance in connection with purchases or sales of interests in investment alternatives (e g., commissions, sales load, deferred sales charges, redemption or exchange fees);
>
> (i) A description of the annual operating expenses of each designated investment alternative (e g , investment management fees, administrative fees, transaction costs) which reduce the rate of return to participants and beneficiaries, and the aggregate amount of such expenses expressed as a percentage of average net assets of the designated investment alternative,

29 C F.R § 2550 404c-1(b)(2)(B)(1)(v), (2)(i).

On their face it appears that the disclosures provide precisely this information Plaintiffs argue that the disclosures of the SPDs and prospectuses do not satisfy the requirements because they do not include such information as whether revenue sharing has occurred and do not include sufficiently detailed breakdown of other expenses not specifically required by the regulations. Plaintiffs suggest that the failure to provide this information prevents informed investment comparison This argument suffers from the same flaw as the argument that revenue sharing

information was required by ERISA disclosure provisions The allegedly omitted disclosures are not required by the language of the regulations and would instead require judicial expansion of the detailed disclosure regime crafted by Congress and the Department of Labor pursuant to its statutory authority

Furthermore, there is nothing to suggest that receiving this additional non-prescribed information would effectively enhance investment decisions In assessing the likely return on an investment the fees netted against the return are certainly relevant, but knowing the subsequent distribution of those fees has no impact on the investment's value *See In re Merrill Lynch Investment Management Funds Securities Litigation*, 434 F Supp 2d 233, 238 (S D N Y 2006) (holding that such information is not material under securities law) In the context of the disclosure of information on investment options the additional information suggested by plaintiffs including revenue sharing is neither required by the regulations nor material to participant investors assessing the investment opportunity

Even had defendants complied with the regulatory prerequisites for safe harbor status, defendants avoid liability for a breach of fiduciary duty only if plaintiff's loss, here the payment of excessive fees, resulted from the participants' exercise of control over the investments Stated differently, the safe harbor acts as a defense only if participants could have avoided the losses by making investment choices available to them *Langbecker v. Electronic Data Systems Corp* , 476 F 3d 299, 312 (5th Cir.2007)

> A plan fiduciary may have violated the duties of selection and monitoring of a plan investment, but § 404(c) recognizes that participants are not

> hapless victims of every error Participants have access to information about the Plan's investments, pursuant to DOL regulations, and they are furnished with risk-diversified investment options
>
> *Id*

Plaintiffs allege that defendants breached their fiduciary duties in this case by failing to properly evaluate the expense ratios applicable to the plan investment options and provide less expensive options so participants paid greater expenses than necessary, resulting in investment losses. When participants made their investment decisions they had access to the expense ratio for each investment fund and could take those expenses into consideration Plaintiffs maintain that this exercise of control was illusory, because every investment option was burdened with excessive expenses and therefore participants were powerless to avoid them. However, the only inference available given the factual allegations is that participants were in a position to exercise control over expenses.

Participants could choose to invest in twenty primary mutual funds and more than 2500 others through BrokerageLink. All of these funds were also offered to investors in the general public so expense ratios were necessarily set to attract investors in the marketplace The expense ratios among the twenty primary funds ranges from just over 1% to as low as 07% Unquestionably, participants were in a position to consider and adjust their investment strategy based in part on the relative cost of investing in these funds It is untenable to suggest that all of the more than 2500 publicly available investment options had excessive expense ratios. The only possible conclusion is that to the extent participants incurred exces-

sive expenses, those losses were the result of participants exercising control over their investments within the meaning of the safe harbor provision

Assuming for purposes of the present motion that defendants failed to satisfy their fiduciary obligation to consider expenses when selecting mutual fund investment options, they are nevertheless insulated from liability by the safe harbor provision because of the nature and breadth of funds made available to participants under the plans

Fidelity Defendants

It follows from the conclusion that no claim has been alleged for breach of fiduciary duty either for failure to disclose information about the plan or for selecting investment alternatives, that no liability can exist against the Fidelity defendants. It should also be noted that were disclosures non-compliant or the safe harbor rule inapplicable, neither of the Fidelity defendants could be liable because neither had fiduciary responsibility for making plan disclosures or selecting plan investments

The trust agreements governing the obligations of the parties, as reflected directly in the allegations of the second amended complaint, unequivocally provide that defendant Deere has sole responsibility for selection of plan investment options ERISA provides that a person is a fiduciary only *to the extent that* it has authority or exercises discretionary control over an aspect of the plan 29 U S.C § 1002(21)(A); *Chicago Dist. Council of Carpenters Welfare Fund v Caremark, Inc* , 474 F 3d 463, 471-72 (7th Cir.2007) Had the Fidelity defendants been fiduciaries for some purposes, they were not fiduciaries for the purposes of making plan investment deci-

sions and accordingly could not be liable for breach of fiduciary duty on the claims

ORDER

IT IS ORDERED that defendants' motion to dismiss is GRANTED

IT IS FURTHER ORDERED that judgment be entered dismissing plaintiffs' complaint with prejudice and costs.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos 07-3605 & 08-1224

DENNIS HECKER, ET AL ,
Plaintiffs-Appellants,

v

DEERE & COMPANY, FIDELITY MANAGEMENT TRUST CO.,
AND FIDELITY MANAGEMENT & RESEARCH CO ,
Defendants-Appellees

June 24, 2009

Before DANIEL A MANION, Circuit Judge. DIANE P WOOD, Circuit Judge, and JOHN DANIEL TINDER, Circuit Judge

ORDER

Appellants filed their Petition for Panel Rehearing and Petition for Rehearing En Banc on March 9, 2009 Appellee Deere & Company and Appellees Fidelity Management Trust Company and Fidelity Management & Research Company filed their Answers to the Petition on April 6, 2009 In addition, three *amicus curiae* briefs in support of rehearing or rehearing *en banc* were filed in conjunction with the Petition: one from the Secretary of Labor (filed March 20, 2009), one from the AARP and other groups (filed March 18, 2009), and one from a group

of law professors (filed March 20, 2009) No judge[1] asked for a vote on the petition for rehearing *en banc*, and all members of the panel have voted to deny the petition for rehearing, with the following addition to the original opinion, *Hecker v Deere & Co.*, 556 F 3d 575 (7th Cir.2009):

The Secretary of Labor has made a number of points in her *amicus* brief that deserve a brief response First, she argues that the panel has erred by failing to give appropriate deference to her interpretation of the regulation implementing 29 U S C § 1104(d), 29 C F R § 2550 404c-1. But, as the Secretary herself acknowledges, the panel did not ignore any language in the regulation proper Instead, it did not give the weight that the Secretary believes is due to some language in a footnote to the preamble to the regulation (We are speaking here of the version of the regulation that was in force at the time relevant to this suit; it should go without saying that the Secretary is free to propose and enact new regulations addressed more specifically to the way in which choice of investment options in a plan relates to the safe harbor provision, if she believes that this would be appropriate) In her brief, the Secretary explains that she presently "interprets her regulation to mean that, even if the plan otherwise qualifies as a section 404(c) plan, the fiduciary is not relieved by 404(c) from liability for plan losses resulting from the imprudent selection and monitoring of an investment option offered by the plan . " As support for that statement, she cites 56 Fed Reg 10724, 10732 n 21 (Mar 13,1991), DOL Opinion Letter No 98-04A, 1998 WL 326300 at *3 n 1 (May 28,1998), DOL

[1] Judge Joel M Flaum and Judge Ilana Diamond Rovner took no part in the consideration of this matter

Information Letter to Douglas O Kant, 1997 WL 1824017 at *2 (Nov. 26, 1997) (Kant Letter) This is enough, she asserts, to make that proposition a rule, entitled to deference under *Chevron USA Inc v Natural Resources Defense Council, Inc*, 467 U S 837, 842-43, 104 S.Ct. 2778, 81 L Ed 2d 694 (1984), rather than a more informal statement of administrative practice, entitled only to respect under the standards of *United States v. Mead Corp*, 533 U S 218, 229-30, 121 S Ct. 2164, 150 L Ed.2d 292 (2001), which in turn relies on *Skidmore v Swift & Co*, 323 U S 134, 65 S.Ct. 161, 89 L.Ed 124 (1944)

With respect, we cannot agree with the Secretary that the footnote in the preamble is entitled to full *Chevron* deference The panel did defer to the Secretary's concerns, to the extent that it refrained from making any definitive pronouncement on "whether the safe harbor applies to the selection of investment options for a plan." *Hecker*, 556 F 3d at 589. Instead, as we explain further in this order, we left this area open for future development, whether on the basis of a different set of pleadings, or on the basis of a regulation directed to this issue The Secretary admits that the panel's primary holding – that there was no duty to scour the market to find the fund with the lowest imaginable fees, and that the fees themselves in the Funds identified in the complaint could not be deemed imprudent because they were offered at the same prices to the general public – does not call into question the validity of even the preamble to the Secretary's regulation, much less the regulation taken as a whole Thus, her real quibble is with the panel's alternate holding that the complaint the court was evaluating contained enough information to warrant the conclusion that Deere was entitled to the safe

harbor defense In our view, the Secretary's concern is more hypothetical than real She fears that some case in the future may arise in which a Plan fiduciary acts imprudently by selecting an overpriced portfolio of funds, and that this opinion will somehow immunize the fiduciary from accountability for that decision

The panel's opinion, however, stands for no such broad proposition It was limited to the complaint before the court, as supplemented by the materials the panel found were properly before the district court Applying the pleading standards enunciated in *Bell Atlantic Corp v Twombly*, 550 U S 544, 127 S Ct. 1955, 167 L Ed 2d 929 (2007), we concluded that these plaintiffs failed to state a claim for the kind of fiduciary misfeasance the Secretary describes At the time we wrote, the Court had not yet handed down *Ashcroft v Iqbal*, --- U S ----, 129 S.Ct 1937, 173 L Ed 2d 868 (2009) *Iqbal* reinforces *Twombly's* message that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id* at 1949. The Court explained further that "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' – 'that the pleader is entitled to relief' Fed. Rule Civ Proc. 8(a)(2)." *Id.* at 1950

The Secretary also fears that our opinion could be read as a sweeping statement that any Plan fiduciary can insulate itself from liability by the simple expedient of including a very large number of investment alternatives in its portfolio and then shifting to the participants the responsibility for choosing among

them She is right to criticize such a strategy It could result in the inclusion of many investment alternatives that a responsible fiduciary should exclude It also would place an unreasonable burden on unsophisticated plan participants who do not have the resources to pre-screen investment alternatives. The panel's opinion, however, was not intended to give a green light to such "obvious, even reckless, imprudence in the selection of investments" (as the Secretary puts it in her brief) Instead, the opinion was tethered closely to the facts before the court Plaintiffs never alleged that any of the 26 investment alternatives that Deere made available to its 401(k) participants was unsound or reckless, nor did they attack the BrokerageLink facility on that theory They argued – and especially in their Petition for Rehearing they continue to argue – that the Plans were flawed because Deere decided to accept "retail" fees and did not negotiate presumptively lower "wholesale" fees The opinion discusses a number of reasons why that particular assertion is not enough, in the context of these Plans, to state a claim, and we adhere to that discussion

We add another point that was raised earlier but that we did not mention in the opinion· the complaint is silent about the services that Deere participants received from the company sponsored plans It would be one thing if they were treated exactly like all other retail market purchasers of Fidelity mutual fund shares, it would be quite another if, for example, they received extra investment advice from someone dedicated to the Deere accounts, or if they received other extra services. If the Deere participants received more for the same amount of money, then their effective cost of participation may in fact

have approached wholesale levels. We return, therefore, to the general point made in the opinion *this* complaint, alleging that Deere chose *this* package of funds to offer for its 401(k) Plan participants, with this much variety and this much variation in associated fees, failed to state a claim upon which relief can be granted.

We therefore DENY the Petition for Rehearing and Petition for Rehearing *En Banc*

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Employee Retirement Income Security Act of 1974, § 404, 29 U S C § 1104, provides.

29 U.S.C. § 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –

(A) for the exclusive purpose of

(i) providing benefits to participants and their beneficiaries, and

(ii) defraying reasonable expenses of administering the plan,

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims,

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so, and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the

diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title)

(b) Indicia of ownership of assets outside jurisdiction of district courts

Except as authorized by the Secretary by regulations, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States

(c) Control over assets by participant or beneficiary

(1)(A) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary) –

(i) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(ii) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control, except that this clause shall not apply in connection with such participant or beneficiary for any blackout period during which the ability of such participant or beneficiary to direct the investment of the assets in his or her account is suspended by a plan sponsor or fiduciary

(B) If a person referred to in subparagraph (A)(ii) meets the requirements of this subchapter in connection with authorizing and implementing the blackout period, any person who is otherwise a fiduciary shall not be liable under this subchapter for any loss occurring during such period

(C) For purposes of this paragraph, the term "blackout period" has the meaning given such term by section 1021(i)(7) of this title

(2) In the case of a simple retirement account established pursuant to a qualified salary reduction arrangement under section 408(p) of Title 26, a participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account upon the earliest of –

(A) an affirmative election among investment options with respect to the initial investment of any contribution,

(B) a rollover to any other simple retirement account or individual retirement plan, or

(C) one year after the simple retirement account is established.

No reports, other than those required under section 1021(g) of this title, shall be required with respect to a simple retirement account established pursuant to such a qualified salary reduction arrangement

(3) In the case of a pension plan which makes a transfer to an individual retirement account or annuity of a designated trustee or issuer under section 401(a)(31)(B) of the Internal Revenue Code of 1986, the participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account or annuity upon –

(A) the earlier of –

(i) a rollover of all or a portion of the amount to another individual retirement account or annuity, or

(ii) one year after the transfer is made, or

(B) a transfer that is made in a manner consistent with guidance provided by the Secretary

(4)(A) In any case in which a qualified change in investment options occurs in connection with an individual account plan, a participant or beneficiary shall not be treated for purposes of paragraph (1) as not exercising control over the assets in his account in connection with such change if the requirements of subparagraph (C) are met in connection with such change

(B) For purposes of subparagraph (A), the term "qualified change in investment options" means, in connection with an individual account plan, a change in the investment options offered to the participant or beneficiary under the terms of the plan, under which –

(i) the account of the participant or beneficiary is reallocated among one or more remaining or new investment options which are offered in lieu of one or more investment options offered immediately prior to the effective date of the change, and

(ii) the stated characteristics of the remaining or new investment options provided under clause (i), including characteristics relating to risk and rate of return, are, as of immediately after the change, reasonably similar to those of the existing investment options as of immediately before the change

(C) The requirements of this subparagraph are met in connection with a qualified change in investment options if –

(i) at least 30 days and no more than 60 days prior to the effective date of the change, the plan administrator furnishes written notice of the change to the participants and beneficiaries, including information comparing the existing and new investment options and an explanation that, in the absence of affirmative investment instructions from the participant or beneficiary to the contrary, the account of the participant or beneficiary will be invested in the manner described in subparagraph (B),

(ii) the participant or beneficiary has not provided to the plan administrator, in advance of the effective date of the change, affirmative investment instructions contrary to the change, and

(iii) the investments under the plan of the participant or beneficiary as in effect immediately prior to the effective date of the change were the product of the exercise by such participant or beneficiary of control over the assets of the account within the meaning of paragraph (1)

(5) Default investment arrangements

(A) In general

For purposes of paragraph (1), a participant or beneficiary in an individual account plan meeting the notice requirements of subparagraph (B) shall be treated as exercising control over the assets in the account with respect to the amount of contributions and earnings which, in the absence of an investment election by the participant or beneficiary, are invested by the plan in accordance with regulations prescribed by the Secretary. The regulations under this subparagraph shall provide guidance on the appropriateness of designat-

ing default investments that include a mix of asset classes consistent with capital preservation or long-term capital appreciation, or a blend of both

(B) Notice requirements

(i) In general

The requirements of this subparagraph are met if each participant or beneficiary –

(I) receives, within a reasonable period of time before each plan year, a notice explaining the employee's right under the plan to designate how contributions and earnings will be invested and explaining how, in the absence of any investment election by the participant or beneficiary, such contributions and earnings will be invested, and

(II) has a reasonable period of time after receipt of such notice and before the beginning of the plan year to make such designation

(ii) Form of notice

The requirements of clauses (i) and (ii) of section 401(k)(12)(D) of Title 26 shall apply with respect to the notices described in this subparagraph

(d) Plan terminations

(1) If, in connection with the termination of a pension plan which is a single-employer plan, there is an election to establish or maintain a qualified replacement plan, or to increase benefits, as provided under section 4980(d) of Title 26, a fiduciary shall discharge the fiduciary's duties under this subchapter and subchapter III of this chapter in accordance with the following requirements:

(A) In the case of a fiduciary of the terminated plan, any requirement –

(i) under section 4980(d)(2)(B) of Title 26 with respect to the transfer of assets from the terminated plan to a qualified replacement plan, and

(ii) under section 4980(d)(2)(B)(ii) or 4980(d)(3) of Title 26 with respect to any increase in benefits under the terminated plan.

(B) In the case of a fiduciary of a qualified replacement plan, any requirement –

(i) under section 4980(d)(2)(A) of Title 26 with respect to participation in the qualified replacement plan of active participants in the terminated plan,

(ii) under section 4980(d)(2)(B) of Title 26 with respect to the receipt of assets from the terminated plan, and

(iii) under section 4980(d)(2)(C) of Title 26 with respect to the allocation of assets to participants of the qualified replacement plan

(2) For purposes of this subsection –

(A) any term used in this subsection which is also used in section 4980(d) of Title 26 shall have the same meaning as when used in such section, and

(B) any reference in this subsection to Title 26 shall be a reference to Title 26 as in effect immediately after the enactment of the Omnibus Budget Reconciliation Act of 1990

29 C F R § 2550 404c-1 provides

§ 2550.404c-1. ERISA section 404(c) plans.

(a) *In general* (1) Section 404(c) of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) provides that if a pension plan that provides for individual accounts permits a participant or beneficiary to exercise control over assets in his account and that participant or beneficiary in fact exercises control over assets in his account, then the participant or beneficiary shall not be deemed to be a fiduciary by reason of his exercise of control and no person who is otherwise a fiduciary shall be liable for any loss, or by reason of any breach, which results from such exercise of control. This section describes the kinds of plans that are "ERISA section 404(c) plans," the circumstances in which a participant or beneficiary is considered to have exercised independent control over the assets in his account as contemplated by section 404(c), and the consequences of a participant's or beneficiary's exercise of control.

(2) The standards set forth in this section are applicable solely for the purpose of determining whether a plan is an ERISA section 404(c) plan and whether a particular transaction engaged in by a participant or beneficiary of such plan is afforded relief by section 404(c) Such standards, therefore, are not intended to be applied in determining whether, or to what extent, a plan which does not meet the requirements for an ERISA section 404(c) plan or a fiduciary with respect to such a plan satisfies the fiduciary responsibility or other provisions of title I of the Act.

(b) *ERISA section 404(c) plans* – (1) *In general.* An "ERISA section 404(c) Plan" is an individual account plan described in section 3(34) of the Act that

(i) Provides an opportunity for a participant or beneficiary to exercise control over assets in his individual account (see paragraph (b)(2) of this section), and

(ii) Provides a participant or beneficiary an opportunity to choose, from a broad range of investment alternatives, the manner in which some or all of the assets in his account are invested (see paragraph (b)(3) of this section)

(2) *Opportunity to exercise control* (i) a plan provides a participant or beneficiary an opportunity to exercise control over assets in his account only if

(A) Under the terms of the plan, the participant or beneficiary has a reasonable opportunity to give investment instructions (in writing or otherwise, with opportunity to obtain written confirmation of such instructions) to an identified plan fiduciary who is obligated to comply with such instructions except as otherwise provided in paragraph (b)(2)(ii)(B) and (d)(2)(ii) of this section, and

(B) The participant or beneficiary is provided or has the opportunity to obtain sufficient information to make informed decisions with regard to investment alternatives available under the plan, and incidents of ownership appurtenant to such investments For purposes of this subparagraph, a participant or beneficiary will not be considered to have sufficient investment information unless –

(*1*) The participant or beneficiary is provided by an identified plan fiduciary (or a person or persons designated by the plan fiduciary to act on his behalf).

(*i*) An explanation that the plan is intended to constitute a plan described in section 404(c) of the Employee Retirement Income Security Act, and title 29 of the Code of Federal Regulations, § 2550 440c-1, and that the fiduciaries of the plan may be relieved of liability for any losses which are the direct and necessary result of investment instructions given by such participant or beneficiary;

(*ii*) A description of the investment alternatives available under the plan and, with respect to each designated investment alternative, a general description of the investment objectives and risk and return characteristics of each such alternative, including information relating to the type and diversification of assets comprising the portfolio of the designed investment alternative;

(*iii*) Identification of any designated investment managers;

(*iv*) An explanation of the circumstances under which participants and beneficiaries may give investment instructions and explanation of any specified limitations on such instructions under the terms of the plan, including any restrictions on transfer to or from a designated investment alternative, and any restrictions on the exercise of voting, tender and similar rights appurtenant to a participant's or beneficiary's investment in an investment alternative;

(*v*) A description of any transaction fees and expenses which affect the participant's or beneficiary's account balance in connection with purchases or sales of interests in investment alternatives (e.g., commissions, sales load, deferred sales charges, redemption or exchange fees);

(*vi*) The name, address, and phone number of the plan fiduciary (and, if applicable, the person or persons designated by the plan fiduciary to act on his behalf) responsible for providing the information described in paragraph (b)(2)(i)(B)(*2*) upon request of a participant or beneficiary and a description of the information described in paragraph (b)(2)(i)(B)(*2*) which may be obtained on request,

(*vii*) In the case of plans which offer an investment alternative which is designed to permit a participant or beneficiary to directly or indirectly acquire or sell any employer security (employer security alternative), a description of the procedures established to provide for the confidentiality of information relating to the purchase, holding and sale of employer securities, and the exercise of voting, tender and similar rights, by participants and beneficiaries, and the name, address and phone number of the plan fiduciary responsible for monitoring compliance with the procedures (see paragraphs (d)(2)(ii)(E)(*4*)(*vii*), (*viii*) and (*ix*) of this section), and

(*viii*) In the case of an investment alternative which is subject to the Securities Act of 1933, and in which the participant or beneficiary has no assets invested, immediately following the participant's or beneficiary's initial investment, a copy of the most recent prospectus provided to the plan This condition will be deemed satisfied if the participant or beneficiary has been provided with a copy of such most recent prospectus immediately prior to the participant's or beneficiary's initial investment in such alternative,

(*ix*) Subsequent to an investment in a investment alternative, any materials provided to the plan relating to the exercise of voting, tender or similar rights

which are incidental to the holding in the account of the participant or beneficiary of an ownership interest in such alternative to the extent that such rights are passed through to participants and beneficiaries under the terms of the plan, as well as a description of or reference to plan provisions relating to the exercise of voting, tender or similar rights

(2) The participants or beneficiary is provided by the identified plan fiduciary (or a person or persons designated by the plan fiduciary to act on his behalf), either directly or upon request, the following information, which shall be based on the latest information available to the plan

(*i*) A description of the annual operating expenses of each designated investment alternative (e g , investment management fees, administrative fees, transaction costs) which reduce the rate of return to participants and beneficiaries, and the aggregate amount of such expenses expressed as a percentage of average net assets of the designated investment alternative,

(*ii*) Copies of any prospectuses, financial statements and reports, and of any other materials relating to the investment alternatives available under the plan, to the extent such information is provided to the plan,

(*iii*) A list of the assets comprising the portfolio of each designated investment alternative which constitute plan assets within the meaning of 29 CFR 2510.3-101, the value of each such asset (or the proportion of the investment alternative which it comprises), and, with respect to each such asset which is a fixed rate investment contract issued by a bank, savings and loan association or insurance company, the name of the issuer of the contract, the term of the contract and the rate of return on the contract;

(*iv*) Information concerning the value of shares or units in designated investment alternatives available to participants and beneficiaries under the plan, as well as the past and current investment performance of such alternatives, determined, net of expenses, on a reasonable and consistent basis; and

(*v*) Information concerning the value of shares or units in designated investment alternatives held in the account of the participant or beneficiary

(ii) A plan does not fail to provide an opportunity for a participant or beneficiary to exercise control over his individual account merely because it –

(A) *Imposes charges for reasonable expenses.* A plan may charge participants' and beneficiaries' accounts for the reasonable expenses of carrying out investment instructions, provided that procedures are established under the plan to periodically inform such participants and beneficiaries of actual expenses incurred with respect to their respective individual accounts,

(B) *Permits a fiduciary to decline to implement investment instructions by participants and beneficiaries* A fiduciary may decline to implement participant and beneficiary instructions which are described at paragraph (d)(2)(ii) of this section, as well as instructions specified in the plan, including instructions –

(*1*) Which would result in a prohibited transaction described in ERISA section 406 or section 4975 of the Internal Revenue Code, and

(*2*) Which would generate income that would be taxable to the plan;

(C) *Imposes reasonable restrictions on frequency of investment instructions* A plan may impose rea-

sonable restrictions on the frequency with which participants and beneficiaries may give investment instructions In no event, however, is such a restriction reasonable unless, with respect to each investment alternative made available by the plan, it permits participants and beneficiaries to give investment instructions with a frequency which is appropriate in light of the market volatility to which the investment alternative may reasonably be expected to be subject, provided that –

(*1*) At least three of the investment alternatives made available pursuant to the requirements of paragraph (b)(3)(i)(B) of this section, which constitute a broad range of investment alternatives, permit participants and beneficiaries to give investment instructions no less frequently than once within any three month period, and

(*2*)(*i*) At least one of the investment alternatives meeting the requirements of paragraph (b)(2)(ii)(C)(*1*) of this section permits participants and beneficiaries to give investment instructions with regard to transfers into the investment alternative as frequently as participants and beneficiaries are permitted to give investment instructions with respect to any investment alternative made available by the plan which permits participants and beneficiaries to give investment instructions more frequently than once within any three month period, or

(*ii*) With respect to each investment alternative which permits participants and beneficiaries to give investment instructions more frequently than once within any three month period, participants and beneficiaries are permitted to direct their investments from such alternative into an income producing, low risk, liquid fund, subfund, or account as

frequently as they are permitted to give investment instructions with respect to each such alternative and, with respect to such fund, subfund or account, participants and beneficiaries are permitted to direct investments from the fund, subfund or account to an investment alternative meeting the requirements of paragraph (b)(2)(ii)(C)(*1*) as frequently as they are permitted to give investment instructions with respect to that investment alternative, and

(*3*) With respect to transfers from an investment alternative which is designed to permit a participant or beneficiary to directly or indirectly acquire or sell any employer security (employer security alternative) either.

(*i*) All of the investment alternatives meeting the requirements of paragraph (b)(2)(ii)(C)(*1*) of this section must permit participants and beneficiaries to give investment instructions with regard to transfers into each of the investment alternatives as frequently as participants and beneficiaries are permitted to give investment instructions with respect to the employer security alternative, or

(*ii*) Participants and beneficiaries are permitted to direct their investments from each employer security alternative into an income producing, low risk, liquid fund, subfund, or account as frequently as they are permitted to give investment instructions with respect to such employer security alternative and, with respect to such fund, subfund, or account, participants and beneficiaries are permitted to direct investments from the fund, subfund or account to each investment alternative meeting the requirements of paragraph (b)(2)(ii)(C)(*1*) as frequently as they are permitted to give investment instructions with respect to each such investment alternative.

(iii) Paragraph (c) of this section describes the circumstances under which a participant or beneficiary will be considered to have exercised independent control with respect to a particular transaction

(3) *Broad range of investment alternatives.* (i) A plan offers a broad range of investment alternatives only if the available investment alternatives are sufficient to provide the participant or beneficiary with a reasonable opportunity to:

(A) Materially affect the potential return on amounts in his individual account with respect to which he is permitted to exercise control and the degree of risk to which such amounts are subject,

(B) Choose from at least three investment alternatives

(*1*) Each of which is diversified,

(*2*) Each of which has materially different risk and return characteristics,

(*3*) Which in the aggregate enable the participant or beneficiary by choosing among them to achieve a portfolio with aggregate risk and return characteristics at any point within the range normally appropriate for the participant or beneficiary, and

(*4*) Each of which when combined with investments in the other alternatives tends to minimize through diversification the overall risk of a participant's or beneficiary's portfolio,

(C) Diversify the investment of that portion of his individual account with respect to which he is permitted to exercise control so as to minimize the risk of large losses, taking into account the nature of the plan and the size of participants' or beneficiaries' accounts In determining whether a plan provides the participant or beneficiary with a reasonable op-

portunity to diversify his investments, the nature of the investment alternatives offered by the plan and the size of the portion of the individual's account over which he is permitted to exercise control must be considered Where such portion of the account of any participant or beneficiary is so limited in size that the opportunity to invest in look-through investment vehicles is the only prudent means to assure an opportunity to achieve appropriate diversification, a plan may satisfy the requirements of this paragraph only by offering look-through investment vehicles.

(ii) *Diversification and look-through investment vehicles.* Where look-through investment vehicles are available as investment alternatives to participants and beneficiaries, the underlying investments of the look-through investment vehicles shall be considered in determining whether the plan satisfies the requirements of subparagraphs (b)(3)(i)(B) and (b)(3)(i)(C).

(c) *Exercise of control* – (1) *In general* (i) Sections 404(c)(1) and 404(c)(2) of the Act and paragraphs (a) and (d) of this section apply only with respect to a transaction where a participant or beneficiary has exercised independent control in fact with respect to the investment of assets in his individual account under an ERISA section 404(c) plan

(ii) For purposes of sections 404(c)(1) and 404(c)(2) of the Act and paragraphs (a) and (d) of this section, a participant or beneficiary will be deemed to have exercised control with respect to the exercise of voting, tender and similar rights appurtenant to the participant's or beneficiary's ownership interest in an investment alternative, provided that the participant's or beneficiary's investment in the investment alternative was itself the result of an exercise of

control, the participant or beneficiary was provided a reasonable opportunity to give instruction with respect to such incidents of ownership, including the provision of the information described in paragraph (b)(2)(i)(B)(*1*)(*ix*) of this section, and the participant or beneficiary has not failed to exercise control by reason of the circumstances described in paragraph (c)(2) with respect to such incidents of ownership

(2) *Independent control* Whether a participant or beneficiary has exercised independent control in fact with respect to a transaction depends on the facts and circumstances of the particular case. However, a participant's or beneficiary's exercise of control is not independent in fact if

(i) The participant or beneficiary is subjected to improper influence by a plan fiduciary or the plan sponsor with respect to the transaction;

(ii) A plan fiduciary has concealed material nonpublic facts regarding the investment from the participant or beneficiary, unless the disclosure of such information by the plan fiduciary to the participant or beneficiary would violate any provision of federal law or any provision of state law which is not preempted by the Act, or

(iii) The participant or beneficiary is legally incompetent and the responsible plan fiduciary accepts the instructions of the participant or beneficiary knowing him to be legally incompetent.

(3) *Transactions involving a fiduciary.* In the case of a sale, exchange or leasing of property (other than a transaction described in paragraph (d)(2)(ii)(E) of this section) between an ERISA section 404(c) plan and a plan fiduciary or an affiliate of such a fiduciary, or a loan to a plan fiduciary or an affiliate of

such a fiduciary, the participant or beneficiary will not be deemed to have exercised independent control unless the transaction is fair and reasonable to him. For purposes of this paragraph (c)(3), a transaction will be deemed to be fair and reasonable to a participant or beneficiary if he pays no more than, or receives no less than, adequate consideration (as defined in section 3(18) of the Act) in connection with the transaction

(4) *No obligation to advise.* A fiduciary has no obligation under part 4 of title I of the Act to provide investment advice to a participant or beneficiary under an ERISA section 404(c) plan.

(d) *Effect of independent exercise of control* – (1) *Participant or beneficiary not a fiduciary.* If a participant or beneficiary of an ERISA section 404(c) plan exercises independent control over assets in his individual account in the manner described in paragraph (c), then such participant or beneficiary is not a fiduciary of the plan by reason of such exercise of control

(2) *Limitation on liability of plan fiduciaries.* (i) If a participant or beneficiary of an ERISA section 404(c) plan exercises independent control over assets in his individual account in the manner described in paragraph (c), then no other person who is a fiduciary with respect to such plan shall be liable for any loss, or with respect to any breach of part 4 of title I of the Act, that is the direct and necessary result of that participant's or beneficiary's exercise of control.

(ii) Paragraph (d)(2)(i) does not apply with respect to any instruction, which if implemented –

(A) Would not be in accordance with the documents and instruments governing the plan insofar as such

documents and instruments are consistent with the provisions of title I of ERISA,

(B) Would cause a fiduciary to maintain the indicia of ownership of any assets of the plan outside the jurisdiction of the district courts of the United States other than as permitted by section 404(b) of the Act and 29 CFR 2550 404b-1,

(C) Would jeopardize the plan's tax qualified status under the Internal Revenue Code;

(D) Could result in a loss in excess of a participant's or beneficiary's account balance, or

(E) Would result in a direct or indirect

(*1*) Sale, exchange, or lease of property between a plan sponsor or any affiliate of the sponsor and the plan except for the acquisition or disposition of any interest in a fund, subfund or portfolio managed by a plan sponsor or an affiliate of the sponsor, or the purchase or sale of any qualifying employer security (as defined in section 407(d)(5) of the Act) which meets the conditions of section 408(e) of ERISA and section (d)(2)(ii)(E)(*4*) below,

(*2*) Loan to a plan sponsor or any affiliate of the sponsor,

(*3*) Acquisition or sale of any employer real property (as defined in section 407(d)(2) of the Act), or

(*4*) Acquisition or sale of any employer security except to the extent that

(*i*) Such securities are qualifying employer securities (as defined in section 407(d)(5) of the Act);

(*ii*) Such securities are stock or an equity interest in a publicly traded partnership (as defined in section 7704(b) of the Internal Revenue Code of 1986), but only if such partnership is an existing partner-

ship as defined in section 10211(c)(2)(A) of the Revenue Act of 1987 (Public Law 100-203),

(*iii*) Such securities are publicly traded on a national exchange or other generally recognized market,

(*iv*) Such securities are traded with sufficient frequency and in sufficient volume to assure that participant and beneficiary directions to buy or sell the security may be acted upon promptly and efficiently,

(*v*) Information provided to shareholders of such securities is provided to participants and beneficiaries with accounts holding such securities,

(*vi*) Voting, tender and similar rights with respect to such securities are passed through to participants and beneficiaries with accounts holding such securities;

(*vii*) Information relating to the purchase, holding, and sale of securities, and the exercise of voting, tender and similar rights with respect to such securities by participants and beneficiaries, is maintained in accordance with procedures which are designed to safeguard the confidentiality of such information, except to the extent necessary to comply with Federal laws or state laws not preempted by the Act,

(*viii*) The plan designates a fiduciary who is responsible for ensuring that The procedures required under subparagraph (d)(2)(ii)(E)(*4*)(*vii*) are sufficient to safeguard the confidentiality of the information described in that subparagraph, such procedures are being followed, and the independent fiduciary required by subparagraph (d)(2)(ii)(E)(*4*)(*ix*) is appointed, and

(*ix*) An independent fiduciary is appointed to carry out activities relating to any situations which the fiduciary designated by the plan for purposes of subparagraph (d)(2)(ii)(E)(*4*)(*viii*) determines involve a potential for undue employer influence upon participants and beneficiaries with regard to the direct or indirect exercise of shareholder rights. For purposes of this subparagraph, a fiduciary is not independent if the fiduciary is affiliated with any sponsor of the plan

(iii) The individual investment decisions of an investment manager who is designated directly by a participant or beneficiary or who manages a look-through investment vehicle in which a participant or beneficiary has invested are not direct and necessary results of the designation of the investment manager or of investment in the look-through investment vehicle. However, this paragraph (d)(2)(iii) shall not be construed to result in liability under section 405 of ERISA with respect to a fiduciary (other than the investment manager) who would otherwise be relieved of liability by reason of section 404(c)(2) of the Act and paragraph (d) of this section.

(3) *Prohibited transactions.* The relief provided by section 404(c) of the Act and this section applies only to the provisions of part 4 of title I of the Act. Therefore, nothing in this section relieves a disqualified person from the taxes imposed by sections 4975(a) and (b) of the Internal Revenue Code with respect to the transactions prohibited by section 4975(c)(1) of the Code

(e) *Definitions* For purposes of this section:

(1) *Look-through investment vehicle* means:

(i) An investment company described in section 3(a) of the Investment Company Act of 1940, or a series investment company described in section 18(f) of the 1940 Act or any of the segregated portfolios of such company,

(ii) A common or collective trust fund or a pooled investment fund maintained by a bank or similar institution, a deposit in a bank or similar institution, or a fixed rate investment contract of a bank or similar institution,

(iii) A pooled separate account or a fixed rate investment contract of an insurance company qualified to do business in a State, or

(iv) Any entity whose assets include plan assets by reason of a plan's investment in the entity,

(2) *Adequate consideration* has the meaning given it in section 3(18) of the Act and in any regulations under this title;

(3) An *affiliate* of a person includes the following:

(i) Any person directly or indirectly controlling, controlled by, or under common control with the person,

(ii) Any officer, director, partner, employee, an employee of an affiliated employer, relative (as defined in section 3(15) of ERISA), brother, sister, or spouse of a brother or sister, of the person, and

(iii) Any corporation or partnership of which the person is an officer director or partner

For purposes of this paragraph (e)(3), the term "control" means, with respect to a person other than an individual, the power to exercise a controlling influence over the management or policies of such person

(4) A *designated investment alternative* is a specific investment identified by a plan fiduciary as an available investment alternative under the plan

(f) *Examples* The provisions of this section are illustrated by the following examples. Examples (5) through (11) assume that the participant has exercised independent control with respect to his individual account under an ERISA section 404(c) plan described in paragraph (b) and has not directed a transaction described in paragraph (d)(2)(ii).

(1) Plan A is an individual account plan described in section 3(34) of the Act The plan states that a plan participant or beneficiary may direct the plan administrator to invest any portion of his individual account in a particular diversified equity fund managed by an entity which is not affiliated with the plan sponsor, or any other asset administratively feasible for the plan to hold However, the plan provides that the plan administrator will not implement certain listed instructions for which plan fiduciaries would not be relieved of liability under section 404(c) (see paragraph (d)(2)(ii)). Plan participants and beneficiaries are permitted to give investment instructions during the first week of each month with respect to the equity fund and at any time with respect to other investments The plan provides for the pass-through of voting, tender and similar rights incidental to the holding in the account of a participant or beneficiary of an ownership interest in the equity fund or any other investment alternative available under the plan. The plan administrator of plan A provides each participant and beneficiary with the information described in subparagraphs (*i*), (*ii*), (*iii*), (*iv*), (*v*), (*vi*) and (*vii*) of paragraph (b)(2)(i)(B)(*1*) upon their entry into the plan, and provides updated information in the event of any material change in the information provided Immediately following an investment by a participant or beneficiary in the equity fund, the plan administrator provides a copy of the most recent prospec-

tus received from the fund to the investing participant or beneficiary Immediately following any investment by a participant or beneficiary in any other investment alternative which is subject to the Securities Act of 1933, the plan administrator provides the participant or beneficiary with the most recent prospectus received from that investment alternative (see paragraph (b)(2)(i)(B)(*1*)(*viii*)) Finally, subsequent to any investment by a participant or beneficiary, the plan administrator forwards to the investing participant or beneficiary any materials provided to the plan relating to the exercise of voting, tender or similar rights attendant to ownership of an interest in such investment (see paragraph (b)(2)(i)(B)(*1*)(*ix*)) Upon request, the plan administrator provides each participant or beneficiary with copies of any prospectuses, financial statements and reports, and any other materials relating to the investment alternatives available under the plan which are received by the plan (see paragraph (b)(2)(i)(B)(*2*)(*ii*)) Also upon request, the plan administrator provides each participant and beneficiary with the other information required by paragraph (b)(2)(i)(B)(*2*) with respect to the equity fund, which is a designated investment alternative, including information concerning the latest available value of the participant's or beneficiary's interest in the equity fund (see paragraph (b)(2)(i)(B)(*2*)(*v*)) Plan A meets the requirements of paragraphs (b)(2)(i)(B)(*1*) and (*2*) of this section regarding the provision of investment information

NOTE The regulation imposes no additional obligation on the administrator to furnish or make available materials relating to the companies in which the equity fund invests (e g , prospectuses, proxies, etc)

(2) Plan C is an individual account plan described in section 3(34) of the Act under which participants and beneficiaries may choose among three investment alternatives which otherwise meet the requirements of paragraph (b) of this section The plan permits investment instruction with respect to each investment alternative only

on the first 10 days of each calendar quarter, i e January 1-10, April 1-10, July 1-10 and October 1-10 Plan C satisfies the condition of paragraph (b)(2)(ii)(C)(*1*) that instruction be permitted not less frequently than once within any three month period, since there is not any three month period during which control could not be exercised

(3) Assume the same facts as in paragraph (f)(2), except that investment instruction may only be given on January 1, April 4, July 1 and October 1 Plan C is not an ERISA section 404(c) plan because it does not satisfy the condition of paragraph (b)(2)(ii)(C)(*1*) that instruction be permitted not less frequently than once within any three month period Under these facts, there is a three month period, e g , January 2 through April 1, during which control could not be exercised by participants and beneficiaries

(4) Plan D is an individual account plan described in section 3(34) of the Act under which participants and beneficiaries may choose among three diversified investment alternatives which constitute a broad range of investment alternatives The plan also permits investment instruction with respect to an employer securities alternative but provides that a participant or beneficiary can invest no more than 25% of his account balance in this alternative This restriction does not affect the availability of relief under section 404(c) inasmuch as it does not relate to the three diversified investment alternatives and, therefore, does not cause the plan to fail to provide an opportunity to choose from a broad range of investment alternatives

(5) A participant, P, independently exercises control over assets in his individual account plan by directing a plan fiduciary, F, to invest 100% of his account balance in a single stock P is not a fiduciary with respect to the plan by reason of his exercise of control and F will not be liable for any losses that necessarily result form P's investment instruction

(6) Assume the same facts as in paragraph (f)(5), except that P directs F to purchase the stock from B, who is a party in interest with respect to the plan Neither P nor F has engaged in a transaction prohibited under section 406 of the Act P because he is not a fiduciary with respect to the plan by reason of his exercise of control and F because he is not liable for any breach of part 4 of title I that is the direct and necessary consequence of P's exercise of control However, a prohibited transaction under section 4975(c) of the Internal Revenue Code may have occurred, and, in the absence of an exemption, tax liability may be imposed pursuant to sections 495 (a) and (b) of the Code

(7) Assume the same facts as in paragraph (f)(5), except that P does not specify that the stock be purchased from B, and F chooses to purchase the stock from B In the absence of an exemption, F has engaged in a prohibited transaction described in 406(a) of ERISA because the decision to purchase the stock from B is not a direct or necessary result of P's exercise of control

(8) Pursuant to the terms of the plan, plan fiduciary F designates three reputable investment managers whom participants may appoint to manage assets in their individual accounts Participant P selects M, one of the designated managers, to manage the assets in his account M prudently manages P's account for 6 months after which he incurs losses in managing the account through his imprudence M has engaged in a breach of fiduciary duty because M's imprudent management of P's account is not a direct or necessary result of P's exercise of control (the choice of M as manager) F has no fiduciary liability for M's imprudence because he has no affirmative duty to advise P (see paragraph (c)(4)) and because F is relieved of co-fiduciary liability by reason of section 404(c)(2) (see paragraph (d)(2)(ii)) F does have a duty to monitor M's performance to determine the suitability of continuing M as an investment manager, however, and M's imprudence would be a factor which F must consider in periodically reevaluating its decision to designate M

(9) Participant P instructs plan fiduciary F to appoint G as his investment manager pursuant to the terms of the plan which provide P total discretion in choosing an investment manager Through G's imprudence, G incurs losses in managing P's account G has engaged in a breach of fiduciary duty because G's imprudent management of P's account is not a direct or necessary result of P's exercise of control (the choice of G as manager) Plan fiduciary F has no fiduciary liability for G's imprudence because F has no obligation to advise P (see paragraph (c)(4)) and because F is relieved of co-fiduciary liability for G's actions by reason of section 404(c)(2) (see paragraph (d)(2)(ii)) In addition, F also has no duty to determine the suitability of G as an investment manager because the plan does not designate G as an investment manager

(10) Participant P directs a plan fiduciary, F, a bank, to invest all of the assets in his individual account in a collective trust fund managed by F that is designed to be invested solely in a diversified portfolio of common stocks Due to economic conditions, the value of the common stocks in the bank collective trust fund declines while the value of publicly-offered fixed income obligations remains relatively stable F is not liable for any losses incurred by P solely because his individual account was not diversified to include fixed income obligations Such losses are the direct result of P's exercise of control, moreover, under paragraph (c)(4) of this section F has no obligation to advise P regarding his investment decisions

(11) Assume the same facts as in paragraph (f)(10) except that F, in managing the collective trust fund, invests the assets of the fund solely in a few highly speculative stocks F is liable for losses resulting from its imprudent investment in the speculative stocks and for its failure to diversify the assets of the account This conduct involves a separate breach of F's fiduciary duty that is not a direct or necessary result of P's exercise of control (see paragraph (d)(2)(ii))

(g) *Effective date* – (1) *In general.* Except as provided in paragraph (g)(2), this section is effective with respect to transactions occurring on or after the first day of the second plan year beginning on or after October 13, 1992

(2) This section is effective with respect to transactions occurring under a plan maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers ratified before October 13, 1992 after the later of the date determined under paragraph (g)(1) or the date on which the last collective bargaining agreement terminates For purposes of this paragraph (g)(2), any extension or renegotiation of a collective bargaining agreement which is ratified on or after October 13, 1992 is to be disregarded in determining the date on which the agreement terminates

(3) Transactions occurring before the date determined under subparagraph (g)(1) or (2) of this section, as applicable, are governed by section 404(c) of the Act without regard to the regulation

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

WILLIAM K SUTER
Clerk of the Court
(202) 479-3011

September 14, 2009

Mr David C. Frederick
Kellogg, Huber, Hansen, Todd,
Evans & Figel, P L.L.C
1615 M Street, N W
Suite 400
Washington, DC 20036

Re Dennis Hecker, et al.
v Deere & Company, et al
Application No. 09A249

Dear Mr Frederick

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on September 14, 2009 extended the time to and including October 14, 2009

This letter has been sent to those designated on the attached notification list

Sincerely,

William K. Suter, Clerk
by /s/ CLAYTON HIGGINS

Clayton Higgins
Case Analyst

[attached notification list omitted]

Supreme Court US
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No 09-447

IN THE
Supreme Court of the United States

DENNIS HECKER, *et al*,

Petitioners,

v

DEERE & COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

DAVID W. MEIER
DEERE & COMPANY
One John Deere Place
Moline, Illinois 61265
(309) 765-8000

SARI M. ALAMUDDIN
JAMES E. BAYLES, JR.
PETER BUSCEMI
CHARLES C. JACKSON*
MORGAN, LEWIS & BOCKIUS LLP
77 West Wacker Drive
Fifth Floor
Chicago, Illinois 60601
(312) 324-1000

* *Counsel of Record*

Attorneys for Respondent

226728

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether the courts below correctly dismissed petitioners' breach of fiduciary duty claims based on allegations of "excessive" fees associated with the investment options offered in respondent's 401(k) retirement plans, where those options included a wide array of mutual funds and the "excessive fee" claims related entirely to allegedly improper "revenue sharing" between the mutual funds' investment advisor and the plans' trustee.

2. Whether the court of appeals correctly held that ERISA Section 404(c) provides an affirmative defense to a breach of fiduciary duty claim where, as here, the 401(k) plans include a sufficient range of investment options so that participants in the plan have control over the risk of loss, the total amount of fees paid was disclosed, and the only information allegedly not disclosed was information whose disclosure was not required under the governing DOL regulations.

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

STATEMENT PURSUANT TO RULE 29.6

Pursuant to Supreme Court Rule 29.6, respondent states that it has no parent companies and that no publicly held company owns 10% or more of its stock.

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Respondent, Deere & Company ("Deere"), respectfully submits this opposition to the petition for a writ of certiorari.

STATEMENT OF THE CASE

Petitioners ask the Court to decide questions that were not presented in the courts below. The allegations in petitioners' complaint, amended complaint, and second amended complaint ("SAC") bear scant resemblance to the arguments petitioners now seek to advance in this Court. We begin, therefore, by correcting the misimpressions that petitioners have sought to create about what was argued and what was decided in the courts below.

A. The Plans.

Petitioners are participants in one of two participant-directed 401(k) plans – the John Deere Savings and Investment Plan ("SIP") and the John Deere Tax Deferred Savings Plan ("TDS Plan") (collectively, the "Plans"). Resp. App. 3a, 4a, 5a, SAC ¶¶ 10, 12-13, 16 Both Plans – functionally identical for purposes of this lawsuit – are "defined contribution plans" within the meaning of ERISA Section 3(34), 29 U S.C § 1002(34), that provide for an individual account for each participant. Resp App. 15a, SAC ¶ 30; R. 41 Ex. A, p. 218 [1]

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[1] References to "Resp. App __a" and "Pet. App __a" are to the Respondent's Appendix and Petitioners' Appendix, respectively. References to "R __" are to the district court record References to "A __" are to Plaintiffs-Appellants' [7th Cir.] Appendix, *Hecker v. Deere & Co.*, Nos. 07-3605 & 08-1224 (7th Cir. filed Mar. 7, 2009)

Deere is the Plans' Sponsor, the Plan Administrator, and a "named fiduciary," as those terms are defined by ERISA Section 3(16), 29 U.S.C. § 1002(16), and ERISA Section 402(a), 29 U.S.C. § 1102(a) Resp. App. 5a-6a, SAC ¶ 18; R. 41 Ex. A, p. 284; A. 282. Fidelity Management Trust Company ("FMTC") is the Trustee of the Plans. Resp. App. 6a, SAC ¶ 20; A. 46, 282. Fidelity Management & Research Company ("FMR") is an affiliate of FMTC that provides fund management services to Fidelity mutual funds, including the mutual fund investment options offered by the Plans Resp App. 7a, 17a, SAC ¶¶ 22, 36; A. 49-50.

As of December 31, 2006, the Plans offered participants twenty-nine primary investment funds. The Plans also provided access to more than 2,500 mutual funds from Fidelity and other companies through Fidelity's BrokerageLink service. R. 41 Ex. A, pp 214-17. Of the twenty-nine primary investment fund alternatives, twenty-six are retail mutual funds – the same mutual funds Fidelity offers to its non-plan customers. Resp. App. 17a, SAC ¶ 36. Both Plans allow participants to direct the Trustee to invest their individual and Company matching contributions in, and reallocate their contributions among, any one or more of the Plan's twenty-nine primary investment funds (and 2,500 BrokerageLink funds) in such proportions as they see fit R. 41 Ex. A, pp. 214, 218; A. 50.

B. Revenue Sharing Arrangements Between FMR And FMTC That Defray Plan Administration Costs.

FMTC is compensated for its trustee and other Plan services through revenue sharing arrangements with FMR based on the fund-level management fees participants pay to FMR Resp. App. 8a, SAC ¶ 23; A. 276. The Fidelity mutual funds at issue are "no-load" funds: neither the Plans nor participants pay sales charges on the purchase or redemption of shares. Fund-level management fees and other operating expenses are assessed in the same way for all of each fund's Plan and non-Plan shareholders. Management and other fees are expressed as "expense ratios" – that is, as an annualized percentage of a funds' total assets – in the prospectuses for each fund in accordance with SEC requirements. A. 276. They generate a pool of money that compensates FMR and its affiliates for the associated investment management and other services they provide to the funds. Consistent with a widely accepted industry practice, FMR and its affiliates may compensate, or "share" some of their own compensation with, affiliated or unaffiliated parties that perform sales or shareholder administrative services. This may include compensating FMTC for administrative services it provides to the plans and participants. Resp App. 8a, 28a, 29a, SAC ¶¶ 23, 70, 74.

FMTC's services to the Deere plans, paid for by these revenue sharing arrangements, include trustee and recordkeeping services, participant phone and web services, daily valuation services, in-kind processing, participant loan servicing, preparation of year-end tax

documents, and communications describing available investment options. Resp. App. 16a, 26a, SAC ¶¶ 34, 62; A. 61-63, 70, 107, 131-34, 136, 151, 282

C. Proceedings In The District Court To Challenge Fidelity's Revenue Sharing Arrangements.

On December 8, 2006, December 28, 2006, and March 5, 2007, respectively, petitioners filed an original, amended, and second amended complaint against Deere, FMTC, and FMR. R. 2, 3, 35; Resp. App. 1a. Insofar as it relates to Deere, the only remaining defendant, the 130-paragraph SAC, "distilled to the actual causes of action," Pet. App. 36a, alleges that Deere breached its fiduciary duties to the Plans in two ways: (1) by failing to disclose details about the otherwise fully-disclosed fund-level fees charged to participant accounts (specifically, the revenue sharing arrangement between FMR and FMTC), and (2) by imprudently designating as plan investment options Fidelity retail mutual funds that carry "excessive" fees as a result of these revenue sharing arrangements. Resp. App. 28a-33a, SAC ¶¶ 68-90. In addition, to overcome an anticipated defense under ERISA Section 404(c), petitioners alleged in the SAC that the Plans could not qualify for the Section 404(c) safe harbor solely because Deere did not disclose the revenue sharing arrangements to plan participants. Resp. App. 25a, 33a-34a, SAC ¶¶ 60, 91-94.

On June 21, 2007, the district court granted, with prejudice and costs, Deere's motion to dismiss. Pet. App. 48a. With respect to petitioners' failure to disclose claim, the district court concluded that, although "the revenue

sharing issue raised by plaintiffs' complaint is a matter of policy concern within the Department of Labor . . . present regulations do not require the disclosure of the information." Pet App. 41a. With respect to plaintiffs' revenue sharing-based excessive fees claim, the district court found that Deere provided participants with the fee information that ERISA regulations require, that fees for the primary plan investment options ranged from as low as .07% to just over 1%, and that "[t]he only possible conclusion is that to the extent participants incurred excessive expenses, those losses were the result of participants exercising control over their investments . . " Pet. App. 46a-47a. Therefore:

> Assuming for purposes of the present motion that defendants failed to satisfy their fiduciary obligation to consider expenses when selecting mutual fund investment options, they are nevertheless insulated from liability by the safe harbor provision [of ERISA Section 404(c)] because of the nature and breadth of funds made available to participants under the plans.

Pet. App. 47a.

D. Proceedings In The Court Of Appeals.

1. The Court of Appeals Rejects Petitioners' Revenue Sharing Arguments.

The court of appeals affirmed. Pet. App. 31a. Not surprisingly, the court focused on the arguments advanced by petitioners, and, as in the district court,

those arguments concentrated on Fidelity's revenue sharing arrangement. The court rejected petitioners' contention that ERISA required these arrangements to be disclosed. In the court's words, "[h]ow Fidelity Research [FMR] decided to allocate the monies it collected (and about which the participants were fully informed) was not, at the time of the events here, something that had to be disclosed." Pet. App. 18a. The court agreed with the district court's conclusion that "such [a revenue sharing] arrangement . . . violates no statute or regulation." Pet App. 17a. Rejecting petitioners' contention that Deere breached its fiduciary duty under ERISA Section 404(a) by selecting Fidelity mutual funds that carried "excessive" fees as a result of the revenue sharing arrangements between FMR and FMTC, the court held that the undisputed facts left "no room for doubt that the Deere Plans offered a sufficient mix of investments for their participants." Pet. App 19a. Noting the "wide range of expense ratios" among the Fidelity mutual funds and the 2,500 other funds available through BrokerageLink, the court held that "no rational trier of fact could find, on the basis of the facts alleged in this Complaint, that Deere failed to satisfy [its] duty" to furnish an acceptable array of investment vehicles. *Id.* The court emphasized that the same funds were also offered to investors in the general public "so the expense ratios necessarily were set against the backdrop of market competition." *Id*

As to petitioners' contention that the Deere Plans failed to qualify for the Section 404(c) safe harbor, the court of appeals reviewed in detail the Department of Labor's implementing regulations, and concluded that those regulations describe in detail the expenses and

fees that must be disclosed. "The fee distribution by the management company post-collection is not one of those fees." Pet. App. 25a (citing 29 C.F.R. §§ 2550.404c-1(b)(2)(i)). Rejecting petitioners' "broadside attack" that the Section 404(c) defense has no applicability to a fiduciary's selection of investment options in the first instance, the court noted that,

> [e]ven if [Section 404(c)] does not always shield a fiduciary from an imprudent selection of funds under every circumstance that can be imagined, it does protect a fiduciary that satisfies the criteria of [Section 404(c)] and includes a sufficient range of options so that the participants have control over the risk of loss.

Pet. App. 26a. Emphasizing that the Plans offered investment options carrying fees ranging from .07% to 1%, the court concluded that "[a]ny allegation that these options did not provide the participants with a reasonable opportunity to accomplish the three goals outlined in the regulation, or control the risk of loss from fees, is implausible . . ." Pet. App. 27a.

The Secretary of Labor ("Secretary") submitted her views in an amicus brief to the Seventh Circuit. She expressly disagreed with petitioners' assertion that the funds selected by the Plans in this case were imprudent because they might surreptitiously support revenue sharing arrangements:

> This is not to say, however, that the Secretary agrees with plaintiffs' more sweeping

> suggestions that the fiduciaries of participant-directed plans must always, or even usually, disclose revenue sharing arrangements as a matter of general fiduciary principles. Indeed, we are skeptical that, absent any misrepresentations, ERISA's duties of prudence and loyalty would have required disclosure to plan participants of revenue sharing among Fidelity affiliates.

Am. Br of Sec'y of Labor, Elaine L. Chao, as Amicus Curiae in Supp. of Pls.-Appellants at 20, *Hecker v. Deere & Co.*, Nos. 07-3605 & 08-1224 (7th Cir. filed Apr. 4, 2008), *available at* http://www.dol.gov/sol/media/briefs/deere(A)-04-02-2008.pdf ("Secy's Brief").

2. Petitioners' Request For Rehearing And Their Shift From Revenue Sharing To A New Theory Of Imprudence.

Petitioners sought rehearing and rehearing en banc. Although continuing to press their contention that the Section 404(c) safe harbor did not apply to Deere's selection of investment options, petitioners changed the focus of their excessive fees claim under Section 404(a) Abandoning their disclosure claims as well as their contention that the practice of revenue sharing unlawfully inflated the cost of the Plans' mutual fund investment options, petitioners instead accused the panel of erroneously relying on the retail market to determine whether the investments Deere selected were

reasonably priced. *See* Pls. Pet for Panel Rehearing & Pet. for Rehearing En Banc at 1-3, *Hecker*, Nos. 07-3605 & 08-1224 (7th Cir. filed Mar. 9, 2009). Petitioners argued, instead, that fiduciaries of large plans, like Deere's, have substantial negotiating power and that ERISA obligates these fiduciaries to use that power to shop for cheaper investment opportunities, like separate accounts, available to institutional-sized investors in the so-called "wholesale" market. *Id* at 2-3.

The Secretary again appeared as an amicus in support of panel rehearing (but not rehearing en banc) to express her views that the Seventh Circuit misapplied Section 404(c) to the selection of investment options. The Secretary did not, however, join petitioners in requesting "rehearing" of their new retail/wholesale excessive fees claim.

The court of appeals denied rehearing and rehearing en banc. Pet. App. 49a-54a. Rejecting the Secretary's "hypothetical" fear that "some [Section 404(c)] case in the future may arise in which a Plan fiduciary acts imprudently by selecting an overpriced portfolio of funds, and that [the court's] opinion will somehow immunize the fiduciary from accountability for that decision," Pet. App. 52a, the court stressed that its decision "was tethered closely to the facts before the court. Plaintiffs never alleged that any of the 26 investment alternatives that Deere made available to its 401(k) participants was unsound or reckless . . . ." Pet. App 53a

Addressing only briefly petitioners' new basis for their excessive fees theory – their claim that Deere breached its fiduciary duty because it populated the Plans' investment menu with mostly retail funds – the court observed that if Deere received both fund management and plan services for the same fees retail investors paid, the effective cost of participation "may in fact have approached wholesale levels." Pet. App. 53a-54a. The court offered no further discussion of this new breach of fiduciary duty theory, returning to the core of its earlier opinion that "*this* complaint, alleging that Deere chose *this* package of funds to offer for its 401(k) Plan participants, with this much variety and this much variation in associated fees, failed to state a claim upon which relief can be granted." Pet. App. 54a (emphasis in original).

REASONS FOR DENYING THE PETITION

The broad questions that petitioners now seek to present, particularly whether ERISA precludes fiduciaries from offering participants in 401(k) defined contribution plans the opportunity to invest in retail mutual funds, are not properly before the Court. Before their petition for rehearing, petitioners' imprudence claim under ERISA Section 404(a) was predicated entirely on their contention that ERISA prohibited the revenue sharing arrangements between FMR and FMTC that Deere took advantage of to pay plan costs. The courts below rejected that contention as petitioners presented it in the SAC, and their decisions are completely consonant with ERISA and the views of the Secretary, who has taken no issue with this common industry practice.

Petitioners' counsel has argued in numerous other cases that the decision here presents narrow issues quite different from the broad claims petitioners now try to advance. In addition, petitioners' new theory in this Court – that ERISA prohibits large 401(k) plans, like Deere's, from making use of retail mutual funds – is both waived and without merit. The courts below did not fashion a new test for breach of fiduciary duty, nothing in ERISA requires plan fiduciaries to include any particular mix of options in their plans, fully 91% of 401(k) plans include mutual funds as investment options, and the Secretary herself does not support petitioners' theory that it is inappropriate to include retail mutual funds as 401(k) plan offerings

The court of appeals' alternative holding – that ERISA Section 404(c) provided a defense to petitioners' claims – also does not present a controversy that warrants this Court's attention To begin, the courts below provided independent and adequate grounds for their judgments, so there is no need for the Court to reach the Section 404(c) issue. Moreover, there is no circuit court conflict on Section 404(c), and petitioners challenged Section 404(c)'s application only on the narrow ground that Deere had not disclosed Fidelity's revenue sharing practices. The total fees associated with each mutual fund were fully disclosed through fund prospectuses. Pet. App. 7a, 17a; Resp. App. 17a, 18a-19a, SAC ¶¶ 36, 44. That point is unchallenged. The court of appeals also has not ruled on the Secretary's assertion that some investment selection decisions are outside the scope of Section 404(c). Pet. App. 26a. Rather, this case hinges on the issues that petitioners asked the courts below to decide. Like petitioners' belated general attack

on the use of retail funds, resolution of the full scope of Section 404(c) as it applies to investment selection decisions should await another case that actually presents the issue. The petition for a writ of certiorari should be denied.

I. NO BASIS EXISTS FOR REVIEWING THE COURT OF APPEALS' CONCLUSION UNDER SECTION 404(a) THAT DEERE OFFERED A PRUDENT MENU OF INVESTMENT OPTIONS.

A. Petitioners Limited Their Prudence Challenge To Revenue Sharing Arrangements, The Courts Below Rejected It, And Petitioners Offer No Basis For Overturning That Decision.

Petitioners contend that the "crux" of their claim is that "Deere could readily have selected other investment vehicles – such as institutional mutual funds – with significantly lower fees," rather than the retail mutual funds that were offered under the Deere plans. Pet. 24-25; *see id.* at i, 2, 7, 14, 29-30, 33-34. That is incorrect. Though the Deere plans in fact offered retail mutual fund investments, petitioners did not contend below that the Plans' offerings were overpriced *because* they were retail funds. Petitioners' SAC and argument to the courts below made a much narrower claim: that the asset fees charged against each investment offering were "excessive" because the investment advisor (FMR) engaged in allegedly undisclosed revenue sharing with the Plans' Trustees and primary service provider (FMTC). Pet. App. 16a, 36a.

In the courts below, petitioners asserted that:

> Defendants breached their fiduciary duties by selecting investment options that assessed excessive administrative fees against the Plans via Fidelity's undisclosed "revenue-sharing" program and thereby causing the Plans to pay unreasonable expenses, and by failing to exercise the prudence and loyalty ERISA requires of fiduciaries operating a $3 billion retirement plan.

Joint Consolidated Br of Pls.-Appellants, *Hecker*, Nos. 07-3605 & 08-1224 (7th Cir. filed Mar. 28, 2008) Contrary to the broad implications petitioners attempt in this Court to attribute to the decision below, in numerous other ERISA cases filed by petitioners' counsel (approximately fourteen), petitioners' attorneys have sought to confine the decision as follows:

> Simply stated, *Hecker* involved claims for lack of disclosure and excessive fees paid to the plans' record keeper through "revenue sharing" whereby retail mutual funds forwarded a portion of asset-based investment fees to the plans' record keeper.

Pls.' Status Report of Case and Appellate Proceedings at 4, *Will v. Gen. Dynamics Corp.*, No. 3.06-CV-698-GPM (S.D. Ill. filed Aug. 11, 2009) *See also* Pls. Notice of Supplemental Auth. Regarding Further Developments in *Hecker v. Deere* at 1, *Nolte v. CIGNA Corp.*, No. 2:07-CV-2046-HAB-DGB (C.D Ill filed July 6, 2009) (The Seventh Circuit "unambiguously limit[ed]

the impact of that decision to the unique and inapplicable facts in that case.") According to petitioners' counsel, "the Seventh Circuit restrained the effect of *Hecker I* by repeatedly emphasizing that it was limited to the sufficiency of the facts pleaded in the complaint in that case." Appellants' Reply Br. at 8, *Taylor v. United Tech. Corp.*, No. 09-1343-cv (2d Cir. filed Aug. 10, 2009); Pls. Mem. in Supp. for Leave to File Third Am. Compl. at 2, *Martin v. Caterpillar, Inc.*, No. 07-1009 JBM/JAG (C.D. Ill. filed Nov 5, 2009) ("[T]he Seventh Circuit denied the *Hecker* Plaintiffs' Motion for Rehearing, but significantly modified and narrowed its ruling to one based solely on the Complaint in that case "); Pls.' Resp. to Defs.' June 26, 2009 Notice of Supplemental Auth at 1, *Spano v. Boeing Co.*, No 06-743-DRH at 1 (S.D. Ill. filed June 29, 2009) ("[T]he panel's opinion 'was limited' to the facts and pleadings in *Hecker*.").

Both the district court and the court of appeals understood petitioners' claim in precisely this way. The district court carefully reviewed the investment options offered, petitioners' complaints about revenue sharing between the Fidelity entities, whether ERISA as currently written requires disclosure of revenue sharing arrangements, and legislative proposals to amend ERISA to require disclosure of revenue sharing. The court correctly ruled that petitioners were unable to state either a disclosure or a fiduciary breach claim based on an undisclosed revenue sharing arrangement. Pet. App. 33a-35a, 37a-42a.

The court of appeals affirmed, observing that "[t]he Hecker group's case depends on the proposition that there is something wrong, for ERISA purposes, in that

[revenue sharing] arrangement." Pet. App. 17a. The court concluded that because the petitioners acknowledged "participants were told about the total fees imposed by the various funds, and the participants were free to direct their dollars to lower-cost funds if that was what they wished to do," undisclosed revenue sharing did not establish either a disclosure or fiduciary breach claim under ERISA. Pet. App. 7a-8a, 16a-19a; *accord* Secy's Br. at 20 (ERISA does not require disclosure of revenue sharing).[2]

Both the district court and the court of appeals also rejected petitioners' claim that Deere breached its fiduciary duty by offering plan investment options whose charges were excessive. Both courts found this contention untenable based upon the undisputed factual record regarding the array of investment options and their prices. Pet. App. 19a-20a, 46a. As the court of appeals explained:

> In our view, the undisputed facts leave no room for doubt that the Deere Plans offered a sufficient mix of investments for their participants Thus, even if, as plaintiffs urge, there is a fiduciary duty on the part of a company offering a plan to furnish an acceptable array of investment vehicles, no

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[2] The Securities and Exchange Commission, the primary federal regulator of mutual funds, has long acknowledged that revenue sharing payments from the legitimate profits of mutual fund investment advisers and their affiliates is appropriate in similar situations *See* Investment Company Institute, SEC No-Action Letter, 1998 WL 1543541 (Oct 30, 1998).

> rational trier of fact could find, on the basis of the facts alleged in this Complaint, that Deere failed to satisfy that duty As the district court pointed out, there was a wide range of expense ratios among the twenty Fidelity mutual funds and the 2,500 other funds available through BrokerageLink. At the low end, the expense ratio was .07%; at the high end, it was just over 1%. Importantly, all of these funds were also offered to investors in the general public, and so the expense ratios necessarily were set against the backdrop of market competition The fact that it is possible that some other funds might have had even lower ratios is beside the point; nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund (which might, of course, be plagued by other problems).

Pet App. 19a-20a. The petition offers no basis for reviewing the lower courts' decision not to second-guess the fiduciary's judgments under these specific circumstances *See Braden v. Wal-Mart Stores, Inc.*, __ F.3d __, No. 08-3798, 2009 WL 4062105, at *8 nn.6-7 (8th Cir Nov. 25, 2009) (agreeing with the Seventh Circuit's statement in *Hecker* that "nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund" and observing that the case before it involved a "far narrower range of investment options").

Indeed, although the fees paid by petitioners were the same as those paid by the general public, they were effectively *less* because Deere participants receive more

services than most shareholders. As petitioners' SAC alleged, participants in the Deere plans not only received investment management services from FMR but also trustee and recordkeeping services from FMTC – services that the public at large does not receive. Resp. App. 16a, 28a, SAC ¶¶ 34, 70. In fact, the SAC understates the services provided by FMTC to Deere participants, these services include not only trustee and recordkeeping services but also participant phone and web services, daily valuation services, in-kind processing, participant loan servicing, preparation of year-end tax documents, and communications describing available investment options *See supra* pp. 3-4. There is no dispute that FMR charged fees to manage the funds in which Deere participants invested that were no higher than it charged Fidelity retail customers, or that FMTC provided services to Plan participants that retail customers did not receive. Resp. App. 17a-19a, SAC ¶¶ 36, 44

B. Petitioners' New Theory Challenging The Use Of Retail Funds Was Waived, And Lacks Statutory, Empirical, Judicial, Or Agency Support.

Following their initial loss in the court of appeals, petitioners abandoned their excessive cost contention based on revenue sharing between the Fidelity entities, and recast their claim in their rehearing petition to assert imprudence by Deere because its investment lineup was not populated entirely with separate "wholesale" accounts. This new theory is the one that petitioners now pursue in this Court. Petitioners' new argument was not raised on a timely basis in the courts

below, and therefore it has been waived. In any event, the theory is without merit.

First, there is no express statutory basis for outlawing retail funds. As the court of appeals correctly observed, "nothing in the statute . . requires plan fiduciaries to include any particular mix of investment vehicles in their plan." Pet. App. 20a. *See Chao v. Merino*, 452 F.3d 174, 182 (2d Cir. 2006) ("ERISA does not impose a 'duty to take any particular course of action if another approach seems preferable.'") (citation omitted)

Second, industry practice does not support petitioners' (and their *amici*'s) argument that retail mutual funds are unsuitable for large defined contribution plans. Such funds are not only suitable, they also are the overwhelming choice of professional plan managers. A Deloitte Consulting survey, for example, showed that, as of the date this case was filed, mutual funds were the most common investment options in 401(k) plans, with *91%* of plans offering them. *See* Deloitte Consulting, *Annual 401(k) Benchmarking Survey. 2005/06 Edition* ("Deloitte Survey"), 19 ex. 71 (2006), *available at* http //www.ifebp.org/pdf/research/2005-06Annual401kSurvey.pdf; *see also* Investment Company Institute, *2008 Investment Company Fact Book*, 92 fig. 7.7 (48th ed. 2008), *available at* http://www.icifactbook.org/pdf/2008_factbook.pdf (as of 2007, 55% of 401(k) plan assets – nearly $1 7 trillion – were invested in mutual funds) Perhaps for this reason, the Secretary stresses that her views on fiduciary duty "should not be construed as suggesting that it is per se illegal for ERISA employee benefit plans to include retail mutual fund options." Br. of Sec'y of Labor as Amicus Curiae in

Supp. of Pl.-Appellant at 18 n. 6, *Braden v. Wal-Mart Stores, Inc.*, No. 08-3798 (8th Cir. filed Mar. 13, 2009), available at http://www dol.gov/sol/media/briefs/braden(A)-03-13-2009.pdf. In addition, industry use of non-retail alternatives, such as allegedly lower cost separate accounts – petitioners' preferred alternative — is relatively rare. *See* Deloitte Survey, 19 ex. 71 (20% of 401(k) plans offered separate accounts as investment options). There are reasons for this – petitioners' assertion that mutual funds and unregistered investment accounts provide "identical" or even similar services is a fiction – but the current record provides this Court with no basis to review petitioners' new theory.

At its most basic level, Section 404(a) requires a fiduciary to "discharge his duties with respect to a plan . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. . . ." 29 U.S.C. § 1104(a)(1)(B); *see Katsaros v Cody*, 744 F.2d 270, 279 (2d Cir. 1984). Courts therefore apply an objective benchmark by measuring a fiduciary's behavior against the standards in the investment industry. *See In re Unisys Sav Plan Litig.*, 173 F3d 145, 151 (3d Cir. 1999) (affirming district court finding of prudence in part because "[t]he prevailing view in the investment world at that time was that high yield guaranteed insurance contracts were good risks"); *Ulico Cas. Co. v Clover Capital Mgmt., Inc* , 335 F. Supp. 2d 335, 340 (N.D.N.Y 2004) (measuring fiduciary conduct "against the standards in the investment industry"); *Lanka v.*

O'Higgins, 810 F. Supp. 379, 387 (N.D.N.Y. 1992) (same); *see also Glennie v. Abitibi-Price Corp.* 912 F. Supp. 993, 1003-04 (W.D. Mich. 1996) (rejecting challenge to plan's choice of guaranteed investment contract provider based in part on survey showing similar plans chose same provider); *cf Wsol v Fiduciary Mgmt. Assoc., Inc.*, 266 F.3d 654, 657-58 (7th Cir. 2001) (measuring ERISA reasonableness by reference to the "standard" price available in the "market"). Thus, it is unsurprising that courts have rejected blanket challenges to fiduciary use of common investment products, like mutual funds, in 401(k) plans. *See Young v. Gen Motors Inv. Mgmt. Corp.*, 325 F. App'x. 31 (2d Cir. May 6, 2009) (summary order) (affirming dismissal of ERISA breach of fiduciary claim alleging improper investment in Fidelity mutual funds because plaintiffs failed to allege that fees were so excessive relative to the services rendered that they could not have been the product of arm's-length negotiations).[3]

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[3] *Accord Tibble v Edison Int'l*, 639 F. Supp 2d 1074, 1115-17 (C D Cal. 2009) (granting summary judgment to fiduciaries on claim that retail mutual funds were per se imprudent), *Taylor v United Tech Corp.*, No 3 06-cv-1494 (WWE), 2009 WL 535779, at *10 (D Conn. Mar 3, 2009) (rejecting expert opinion that "less-costly managed separate trust accounts outweigh the advantages of mutual funds"), *aff'd*, No 09-1343, 2009 WL 4255159 (2d Cir. Dec 1, 2009) (summary order); *Kanawi v Bechtel Corp.*, 590 F Supp. 2d 1213, 1229-30 (N D Cal 2008) (rejecting per se prohibition on retail mutual funds).

C. The Court Of Appeals Did Not Apply "Newly-Minted" Principles To Absolve Deere Of Fiduciary Liability.

To sidestep the allegations and legal theory they pursued in the courts below, petitioners ignore the wide range of investment options offered in the Deere Plans, their varying cost structures, and the services provided by FMTC that are paid for through revenue sharing with FMR. Instead, petitioners accuse the court of appeals of focusing its prudence inquiry solely on results rather than the process by which Deere offered investments. This approach, petitioners contend, constitutes a "newly minted" test under Section 404(a)(1)(B), which allegedly departs from the process test used in other circuits that gives primacy to the methods by which fiduciaries "'investigate the merits of the investment. . . .'" Pet. 22, 25 (quoting *Flanigan v. Gen. Elec. Co.*, 242 F.3d 78, 86 (2d Cir. 2001)). This contention is meritless. Although petitioners argued that the Deere fiduciaries should have been more knowledgeable, their principal grievance always centered on revenue sharing. "Process," as such, was never petitioners' focus.

Moreover, the circuits, including the Seventh (long before this case), have lined up consistently to hold that, to be actionable, the plaintiff must establish a causal connection between the conduct alleged and losses "resulting from" that conduct. ERISA Section 409(a), 29 U.S.C § 1109(a); *see* Resp. App. 44a, SAC ¶ 108; *Braden*, 2009 WL 4062105, at *6 ("In order to state a claim under [ERISA § 404(a)], a plaintiff must make a prima facie showing that the defendant acted as a

fiduciary, breached its fiduciary duties, and thereby caused a loss to the Plan."), *Wright v Oregon Metallurgical Corp* , 360 F.3d 1090, 1099 (9th Cir. 2004) ("'[A] plaintiff must show a *causal link* between the failure to investigate and the harm suffered by the plan.'") (emphasis in original) (quoting *Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995)), *Diduck v Kaszycki & Sons Contractors, Inc* , 974 F.2d 270, 279 (2d Cir. 1992) ("[P]roof of a causal connection . . is required between a breach of fiduciary duty and the loss alleged."), *overruled on other grounds*, *Gerosa v. Savasta & Co., Inc* , 329 F3d 317 (2dCir. 2003); *Brock v. Robbins*, 830 F.2d 640, 646 (7th Cir. 1987) (rejecting a failure to investigate claim because "the record supports the district court's finding that the fee terms were in fact reasonable and that therefore there was no loss resulting from trustees' imprudent conduct").

Based on the facts alleged, the court of appeals correctly concluded that petitioners were not injured because they could choose from a variety of investment options with varying costs (including some that were comparable to or below the average costs of the institutional investments that petitioners now favor). As Justice Scalia has observed:

> I know of no case in which a trustee who has happened – through prayer, astrology or just blind luck – to make (or hold) objectively prudent investments (e.g., an investment in a highly regarded "blue chip" stock) has been held liable for losses from those investments because of his failure to investigate and evaluate beforehand.

Fink v Nat'l Sav & Trust Co, 772 F.2d 951, 962 (D.C. Cir. 1985) (Scalia, J., concurring in part and dissenting in part).

Also known as the "hypothetical prudent fiduciary" test, this causation requirement insulates a fiduciary from liability, notwithstanding a failure to conduct an investigation before making a decision, "if a hypothetical prudent fiduciary would have made the same decision anyway" *Roth v. Sawyer-Cleator Lumber Co*, 16 F.3d 915, 919 (8th Cir. 1994) ("[T]he relevance that the facts relating to the stock hold is that they tend to show that the trustees' decision was objectively reasonable regardless of the process by which they reached it and thus that there was no causal connection between their allegedly deficient conduct and a loss to the ESOP."); *see also Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 300 (5th Cir. 2000) ("ERISA's obligations are nonetheless satisfied if the provider selected would have been chosen had the fiduciary conducted a proper investigation."); *In re Unisys Sav Plan Litig.*, 173 F.3d 145, 153-154 (3d Cir. 1999) (applying the "'hypothetical prudent investor test'") (citation omitted).

Thus, far from "minting" a new test, the court of appeals sifted through the allegations that plaintiffs presented and ruled against plaintiffs on the merits of their revenue sharing-fiduciary breach claims. There is no circuit conflict; the decision below is completely consonant with the precedents of the other courts of appeals under Section 404(a). What remains, then, is nothing more than petitioners' disagreement, not with the applicable legal test, but with the factual conclusion on the allegations of this case that the costs associated

with the mutual funds Deere offered to participants were in fact consistent with the decisions of a hypothetical prudent fiduciary. Such a disagreement over a properly stated test, allegedly misapplied to the facts of this case, provides no basis for review here. *See* Sup. Ct R. 10.

D. Questions About Fees In The Mutual Fund Industry Raised In *Jones* Have No Current Implications For ERISA Fiduciaries.

Lastly, petitioners suggest that the Court may wish to hold their petition pending the Court's ruling in *Jones v Harris Associates, L P*, 129 S. Ct. 1579 (2009) (No. 08-586). Pet. 32-34. There is no basis to await the decision in *Jones*. As explained above, the issue petitioners presented in the SAC were narrowly framed claims that did not call into question the efficacy of mutual fund investments in defined contribution plans under ERISA, much less under § 36(b) of the Investment Company Act of 1940, 15 U S C. § 80a-35(b) *et seq.* ("ICA"), addressed in *Jones*.

Specifically, as the Solicitor General acknowledged in her brief in *Jones*, the ICA and ERISA claims at issue involve different legal structures, different duties, and different legal tests. *See* Br. of U.S as Amicus Curiae Supporting Pet'rs at 27 n.8, *Jones*, No. 08-586 (U.S. filed June 15, 2009) ("Because Section 36(b) and ERISA have different statutory language, histories, and purposes, the resolution of this case should not establish the legal standard that should apply to excessive-fee claims against plan fiduciaries under ERISA."). The ICA actually sets up a unique standard under which, besides having to negotiate with an independent board of

trustees, a mutual fund's investment advisor has a fiduciary duty with respect to its own fees. ICA § 36(b). The prevailing standard in ICA § 36(b) actions, now being reviewed by this Court, has been whether the resulting fees were so disproportionately excessive that they could not have been the subject of arm's-length bargaining. *See Jones v Harris Assocs., L.P.*, 537 F.3d 728, 729 (7th Cir. 2008) In contrast, the ERISA issue here is whether, as compared to the choices of other prudent fiduciaries in similar situations, this fiduciary's choices of investment options, and other services provided by third parties, were either the outcome of a prudent process or resulted in the plan incurring service fees that were not unreasonable.[4]

Furthermore, petitioners mistakenly assume that Judge Posner's observations in *Jones*, which were made in the context of defined benefit pension plans, automatically apply in equal measure in the context of defined contribution 401(k) plans. *See* Pet. 33. Even if one were to assume, as Judge Posner suggested, that fiduciaries of *defined benefit* plans should negotiate advisory fees directly with fund providers, that would not imply that fiduciaries of *defined contribution* plans would be obliged to proceed in the same manner. As this Court recently made clear, there are fundamental

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[4] Contrary to their position in this Court, petitioners' attorneys have argued elsewhere that cases decided under the ICA have little relevance to ERISA cases. *See* Appellants' Pet. for Panel Rehearing & Rehearing En Banc at 1, *Taylor*, No. 09-1343-cv (2d Cir. filed Dec. 14, 2009) (criticizing district court for "justifying its reliance on ICA cases to interpret ERISA, because no Court has authoritatively connected the two statutes")

differences between these two types of retirement plans. *See LaRue v. DeWolff, Boberg & Assocs., Inc.*, 522 U.S. 248, 128 S. Ct. 1020, 1025 (2008) ("*Russell*'s emphasis on protecting the 'entire plan' from fiduciary misconduct reflects the former landscape of employee benefit plans. That landscape has changed. Defined contribution plans dominate the retirement plan scene today."). As ERISA Section 404(a)(1)(B) confirms, fiduciaries are required to administer their plans as would a prudent man "in the conduct of an enterprise of a *like* character and with *like* aims " 29 U.S.C § 1104(a)(1)(B) (emphasis added) Because defined benefit plans are not *like* defined contribution plans, what might be expected of fiduciaries of the former is not necessarily what can or should be required of fiduciaries of the latter.

Petitioners attempt to get around industry practice by arguing in effect that the entire industry is rigged and that *all* fiduciaries of defined contribution plans are mismanaging plan assets to the extent they authorize participant investment in retail mutual funds. Pet. 33-34. Relying on Judge Posner's comment in *Jones* that market competition is ineffective to restrain retail mutual fund fees, petitioners contend that this inefficiency undermines the court of appeals' decision in this case that mutual fund fees are "set against the backdrop of market competition" and that mutual funds are suitable investment options for defined contribution plans. *Id* It does not, for three reasons.

First, Judge Posner's observations in *Jones* were well known to the panel that decided this case – indeed, two of the three members of the panel (Judges Wood and Tinder) joined Judge Posner's earlier dissent from

the denial of rehearing en banc in *Jones*. *See Jones*, 537 F.3d 728. The panel plainly did not think *Jones* should affect the decision here. Second, petitioners used *Jones* liberally in their request for rehearing en banc and neither Judge Posner nor any other judge voted to rehear the case. Pet. App. 50a. Third, Judge Posner's observations about alleged abuses in the mutual fund industry implicate both a different law (the ICA) and different standards *See supra* pp. 24-25. ERISA does not prohibit retail fund investments in defined contribution plans, as the court of appeals correctly recognized Pet. App. 20a.

II. THE COURT OF APPEALS' ALTERNATIVE HOLDING – THAT SECTION 404(c)'S SAFE HARBOR INSULATED DEERE FROM LIABILITY FOR PLAN LOSSES – ALSO CREATES NO CONFLICT, AND FAITHFULLY IMPLEMENTS THE STATUTORY TEXT.

The court of appeals properly held that, even if it had "underestimated" Deere's fiduciary responsibilities, the safe harbor provided by Section 404(c) provided "an alternate ground for affirmance " Pet. App. 21a Thus, on its own terms, the 404(c) ruling was not necessary to the judgment below, and therefore is not appropriate for this Court's review.

In addition, the Seventh Circuit's ruling was correct and not in conflict with other circuits. Section 404(c) protects fiduciaries from liability for investment losses in plans, like Deere's, that provide for individual accounts and allow a participant "to exercise control over the assets in his account." 29 U S.C § 1104(c)(1)(A);

see Pet. App. 21a-27a; *id.* at 51a-52a ("[T]he complaint . . . contained enough information to warrant the conclusion that Deere was entitled to the safe harbor defense."). In this case, plaintiffs conceded that the total fees charged were fully disclosed, Pet. App. 7a, 17a; Resp. App. 17a, 18a-19a, SAC ¶¶ 36, 44, and the court of appeals applied Section 404(c) narrowly to the facts alleged. There is no conflict in the circuits as petitioners contend, and the court of appeals has not held that Section 404(c)'s safe harbor shields all fiduciary investment selection decisions from scrutiny.

A. No Circuit Split Exists Over Section 404(c)'s Applicability To Menu Selection.

Petitioners ignore that allegedly undisclosed revenue sharing between the Fidelity entities was the only basis on which petitioners challenged the applicability of Section 404(c) in their SAC. As the court of appeals recognized, petitioners waived all other challenges to Section 404(c), Pet. App. 24a-25a; Resp. App. 33a-37a, SAC ¶¶ 91-102, and did not challenge Deere's investment selection decisions as "unsound or reckless " Pet. App. 53a. Review of the decision below is not warranted.

Section 404(c) provides, in relevant part:

> In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—

* * *

> no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

29 U.S.C. § 1104(c)(1). Pet. App. 56a.

Only two other circuits have actually ruled on the applicability of the Section 404(c) safe harbor to a plan fiduciary's investment selection, and their decisions are consistent with the Seventh Circuit's ruling here. *See Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 309 (5th Cir. 2007); *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 445 (3d Cir. 1996). Petitioners attempt to manufacture a conflict by pointing to contrary language in a footnote in *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 n.3 (4th Cir. 2007), but that comment is dictum. The applicability of Section 404(c) was not an issue on appeal. In that case, the defendant fiduciaries prevailed on the merits following a trial on the plaintiffs' fiduciary breach claims. The Fourth Circuit affirmed, holding that it was prudent to offer U.S. Airways stock in a 401(k) plan despite the decline in the stock's value following the September 11, 2001 terrorist attacks. The court's comments regarding Section 404(c) were superfluous, since neither party briefed the subject and the safe harbor defense was not needed given the lack of liability in the first place. Thus, the purported split is illusory.

B. The Secretary's Preamble Footnote Construction Of Section 404(c) Is Contrary To The Plain Statutory Text, And Is Not Entitled To Deference.

Petitioners rely heavily on the Secretary's construction of Section 404(c). That construction stems from a footnote to the 1992 preamble to the regulations implementing Section 404(c), which state that the "act of limiting or designating investment options . . . is not a direct or necessary result of any participant direction of such plan." Final Regulation Regarding Participant Directed Individual Account Plans (ERISA Section 404(c) Plans), 57 Fed Reg. 46,906, 46,924 n 27 (Oct. 13, 1992) [5] Petitioners contend that the Secretary's footnote is entitled to deference, and that review is necessary to correct the court of appeals' refusal to abide by it. Petitioners are incorrect. Section 404(c) is merely an alternative ground for the court of appeals' decision, and the court would have reached the same outcome even apart from Section 404(c). In any event, the Secretary's footnote is contrary to the plain text of the statute and is not binding agency action to which the lower court was obliged to defer.

The Secretary's footnote is misguided. Plan sponsors or fiduciaries *always* select investment options

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[5] Petitioners reproduce in the Appendix the Secretary's implementing regulations to Section 404(c) – 29 C.F.R. § 2550.404c-1. Pet. App. 62a-83a. These regulations do not include the Secretary's footnote about Section 404(c), because the footnote appeared only in the preamble, which did not make its way into the Code of Federal Regulations. *See Langbecker*, 476 F.3d at 311 n.22.

in defined contribution plans. Participants never do. If the Secretary were correct, Section 404(c) would be written out of the statute for any plan whose investments were chosen by the plan sponsor or fiduciary. Moreover, as the Fifth Circuit observed in *Langbecker*, investment losses in a participant-directed plan cannot occur without a corresponding participant decision to invest. 476 F.3d at 310, 312. The upshot of the Secretary's construction is to "render the § 404(c) defense applicable only where plan managers breached no fiduciary duty, and thus only where it is unnecessary." *Id.* at 311; *accord Unisys*, 74 F.3d at 445.

The statute's plain text does not support the Secretary's footnote. Rather, the text expressly *confines* the Secretary's regulatory authority under Section 404(c) to promulgating regulations that define the meaning of participant "control *over the assets in his account*." *See* 29 U.S.C. § 1104(c)(1)(A) (emphasis added). The Secretary has done that in regulations that the court of appeals painstakingly applied in a straightforward fashion. Pet. App. 21a-23a (citing 29 C.F.R. §§ 2550.404c-1(b)(1)(ii), (b)(2)(ii)(C), (b)(2)(i)(B), (b)(2)(i)(B)(1)(v), (b)(2)(i)(B)(2), (b)(2)(ii)(A) & (c)(2)(ii)). As the regulations require, the court determined that the Deere plans gave participants control over their investment options. The participants were able to choose "'from a broad range of investment alternatives'" and were provided "'sufficient information to make informed decisions with regard to investment alternatives available under the plan'" which included nine "clear labeling" criteria. Pet. App. 21a-23a (citing 29 C.F.R. § 2550.404c-1(b)). As the court of appeals observed, the regulation "sets forth nine criteria that must be met

before the participant may be considered to have sufficient investment information." Pet App. 21a. The court concluded that the Deere plans satisfied these criteria and Deere participants independently exercised control over their investments. Pet. App. 23a. Participants receive the protection they need because the Secretary's rigorous regulatory requirements ensure that Section 404(c) can be invoked only in appropriate circumstances.

The Secretary's footnote, by contrast, disregards the statutory phrase "over the assets in his account" and thereby seeks to expand the Secretary's authority to regulate matters under Section 404(c) over which participants do not have control generally, including investment selection. Even if the footnote were itself a regulation – which it is not – it would be inconsistent with Section 404(c)'s carefully drafted statutory text.

Finally, this Court's precedents make clear that a prerequisite for deference to an agency interpretation is ambiguity, either in a statute the agency is charged with administering ("*Chevron* deference") or in a regulation the agency is authorized to promulgate ("*Auer* deference"). *See, e.g., Christensen v. Harris County*, 529 U.S. 576, 586-87 (2000) ("In *Chevron*, we held that a court must give effect to an agency's regulation containing a reasonable interpretation of an ambiguous statute."); *id.* at 588 ("*Auer* deference is warranted only when the language of the regulation is ambiguous."). Neither plaintiffs, nor the Secretary, nor any court that has considered Section 404(c)'s scope, however, has suggested that Section 404(c) is ambiguous so as to justify deference to the Secretary's

interpretation. *See, e.g.*, *Langbecker*, 476 F3d at 311 (noting that Section 404(c)'s meaning is "tolerably plain"); *id.* at 311 n.22 (no deference to the Secretary where there is no ambiguity).

Under the plain statutory text, the Secretary may regulate the meaning of participant control "over the assets in his account" – not participant control in general as the footnote seeks to do. Furthermore, Section 404(c), by its terms, applies to "*any* breach." 29 U.S.C. § 1104(c)(1)(A)(ii) (emphasis added). Through its use of the word "any," the statutory text rejects any construction that would withdraw certain kinds of fiduciary breaches from its ambit.[6] *See Mertens v Hewitt Assocs.*, 508 U.S. 248, 261 (1993) ("[V]ague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration.") (emphasis in original). Review of the court of appeals' alternate holding under Section 404(c) is not justified.

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[6] The only qualifier is that a participant decision to invest must also have contributed to the loss *Langbecker*, 476 F.3d at 309-11 *See also* H R. Conf Rep No 93-1280, at 305 (1974), *reprinted in* 1974 U S C.C A.N 5038, 5086 ("[I]f the participant instructs the plan trustee to invest the full balance of his account in, e g , a single stock, the trustee is not to be liable for any loss because of a failure to diversify *or because the investment does not meet the prudent man standards* ") (emphasis added)

III. PETITIONERS MISSTATE THE IMPACT OF THE COURT OF APPEALS' DECISION; BY CONTRAST, THE IMPLICATIONS OF REVERSAL ARE ENORMOUS.

Petitioners' policy arguments for review are also without merit. Petitioners claim that the court of appeals has created a Section 404(a) "rule that allows pension plan fiduciaries to invest in a range of retail mutual funds without investigating [ ] lower-priced institutional investment vehicles" and that this alleged rule "will inflict enormous financial losses on the pension plan assets of tens of millions of American workers." Pet. 30. This is a gross misstatement.

The court of appeals did not fashion any "rule" of fiduciary responsibility under Section 404(a) that dispenses with a fiduciary's duty to investigate To the contrary, the court carefully reviewed the Deere Plans and the extensive investment options offered to participants, and it explained why the revenue sharing arrangements about which petitioners complained did not involve any violation of Section 404(a). The court also expressly rejected a construction of its opinion as a "sweeping statement that any Plan fiduciary can insulate itself from liability by the simple expedient of including a very large number of investment alternatives in its portfolio and then shifting to the participants the responsibility for choosing among them." Pet. App. 52a-53a. Instead, the court stressed that its opinion was "tethered closely to the facts before the court." *Id.* at 53a. "[*T*]*his* complaint, alleging that Deere chose *this* package of funds to offer for its 401(k) Plan participants, with this much variety and this much

variation in associated fees, failed to state a claim upon which relief can be granted." *Id.* at 54a (emphasis in original).

Petitioners next suggest that the court of appeals' holding regarding Section 404(c) effectively creates blanket immunity for fiduciaries who breach their responsibilities in selecting plan investment alternatives, thereby obliterating the protections ERISA Section 404(c) provides to participants. Petitioners again ignore Section 404(c)'s plain text and its stringent regulations defining what it means for participants to have control over the assets in their accounts, and exaggerate both the breadth of the decision below and the reach of ERISA's participant protection provisions.

The court of appeals correctly rejected petitioners' and the Secretary's polar construction that the safe harbor can *never* apply to the selection of plan investment options. Pet App. 26a. To the contrary, the court followed the statute and ruled that a fiduciary can take advantage of the Section 404(c) safe harbor *if* it satisfies the criteria of Section 404(c), including the Secretary's implementing regulations defining participant control over the assets in their accounts. *See id.* The court emphasized the Secretary's many regulatory preconditions, including the requirements that fiduciaries structure their plans to give participants control over the assets in their accounts, make available a broad range of investment alternatives, and provide at least *nine* separate categories of investment information Pet. App 21a-23a. The decision below thus confirms that, although the safe harbor can be a

significant affirmative defense, it is also limited in that only diligent fiduciaries will qualify for it. Other fiduciaries must fend for themselves in the usual way – by establishing their prudence under Section 404(a). *See Jenkins v. Yager*, 444 F.3d 916, 924-26 (7th Cir. 2006).

As this Court has recognized, "ERISA [is] an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests – not all in favor of potential plaintiffs." *Mertens*, 508 U.S. at 262. Although the fiduciary responsibility provisions in Section 404(a) are unquestionably critical elements in the statutory scheme, there is more to the statutory analysis than simply whether the outcome is "good" or "bad" for participants and retirees. Participants received the protection of a fiduciary in Section 404(a), but fiduciaries received something, too – the protection of a limited safe harbor in Section 404(c). Section 404(c) rejected the notion that fiduciaries are subject to limitless liability for all breaches, and any construction of Section 404(c) that removes this statutory limit to liability does violence to the statutory scheme.

In contrast to the Seventh Circuit's balanced approach, petitioners seek a reversal that would threaten with per se civil liability the fiduciaries of more than 90% of the nation's defined contribution plans that include common investment products – retail mutual funds – that petitioners now seek to outlaw. This would set a dangerous and far-reaching precedent, subjecting virtually all 401(k) fiduciaries to costly litigation that ultimately will harm participants throughout the United States. ERISA does not require employers to establish employee benefits plans. *See Lockheed Corp. v. Spink*,

517 U.S. 882, 887 (1996). And employers can just as easily stop offering these plans if the costs of doing so become too high. *Cf Cooper v. IBM Pers. Pension Plan*, 457 F.3d 636, 642 (7th Cir. 2006) ("It is possible for litigation about pension plans to make everyone worse off."). A greater deterrent to continued plan sponsorship is hard to imagine than a post-hoc construction of a statute that would declare as illegal the conduct of the fiduciaries for thousands of defined contribution plans, subjecting them to personal liability simply because they used commonly accepted financial products, like mutual funds.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

SARI M. ALAMUDDIN
JAMES E. BAYLES, JR.
PETER BUSCEMI
CHARLES C. JACKSON*
MORGAN, LEWIS & BOCKIUS LLP
77 West Wacker Drive
Fifth Floor
Chicago, Illinois 60601
(312) 324-1000

DAVID W. MEIER
DEERE & COMPANY
One John Deere Place
Moline, Illinois 61265
(309) 765-8000

* *Counsel of Record* *Attorneys for Respondent*

December 16, 2009

APPENDIX

APPENDIX A — SECOND AMENDED COMPLAINT FOR BREACH OF FIDUCIARY DUTY DATED MARCH 26, 2007

IN THE UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WISCONSIN

CASE NUMBER. 06-C-0719-S

JURY TRIAL DEMANDED
AMENDED CLASS ACTION COMPLAINT

DENNIS HECKER, JONNA DUANE, WILLIAM WALLACE, ROGER BRADLEY, and JANICE RIGGINS, individually and on behalf of all those similarly situated

Plaintiffs,

v.

DEERE & COMPANY, FIDELITY MANAGEMENT TRUST COMPANY, and FIDELITY MANAGEMENT & RESEARCH COMPANY,

Defendants.

SECOND AMENDED COMPLAINT FOR BREACH OF FIDUCIARY DUTY

INTRODUCTION

1. Personal savings accounts, such as 401(k)s, are quickly becoming employees' primary method of

financially planning for retirement. For many employees in the United States today, an employer-provided defined benefit pension awaiting their retirement is a quaint, historical notion.

2. In 401(k) plans, employers provide an opportunity for employees to save their own pre-tax dollars in individual 401(k) accounts. The accounts provide a number of investment alternatives into which employees place a portion of their current income with the hope of earning, over time, a return sufficient to support themselves and their families in retirement.

3. Accordingly, in 401(k) plans, the return on employees' investments is critical. Even seemingly small reductions in a participant's return in one year may substantially impair his or her accumulated savings at retirement.

4. While such reductions in 401(k) accounts' returns may result from market fluctuations, a consistent, albeit rarely discussed, force reducing 401(k) accounts' earnings is the administrative fees and expenses assessed against account balances.

5. The most certain means of increasing the return on employees' 401(k) savings is to reduce the fees and expenses employees pay from their 401(k) accounts.

6. Unlike generalized market fluctuations, employers can control these fees and expenses. Federal law requires them to do so.

Appendix A

7. Under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"), an employer who provides a 401(k) plan for its employees is a "Plan Sponsor." The employer or its agent may also serve as "Plan Administrator," or the employer may appoint a third party to serve as such. The Plan Sponsor and the Plan Administrator, among others, are fiduciaries of the 401(k) plan. The Plan Administrator performs or contracts for administrative, record-keeping, investment management, and other services from entities in the financial and retirement industry. ERISA requires that the fees for these services must be reasonable, incurred solely for the benefit of Plan participants, and fully disclosed.

8 For providing various services, third-party plan administrators, record-keepers, consultants, investment managers, and other vendors in the 401(k) industry have developed a variety of pricing and fee structures.

9 At best, these fee structures are complicated and confusing when disclosed to Plan participants. At worst, they are excessive, undisclosed, and illegal.

10. In this action, pursuant to ERISA § 502(a), 29 U.S.C. § 1132(a), Plaintiffs and Class Representatives, on behalf of all similarly situated participants and beneficiaries of the John Deere Savings & Investment Plan, Plan No. 003 and the John Deere Tax Deferred Savings Plan, Plan No 008 (herein the "Plan" or "Plans"), seek to recover the losses suffered by the Plans on a plan wide basis and to obtain injunctive and other

equitable relief for the Plans from the Plans' fiduciaries based upon the fiduciaries' breaches of fiduciary duties.

11. As set forth in detail below, the fees and expenses paid by the Plans, and thus borne by Plan participants, were and are unreasonable and excessive; not incurred solely for the benefit of the Plans and the Plans' participants; and undisclosed to participants. By subjecting the Plans and the participants to these excessive fees and expenses, and by other conduct set forth below, the Defendants violated their fiduciary obligations under ERISA.

PARTIES, JURISDICTION AND VENUE

Plaintiffs

12. Plaintiff and Class Representative Dennis Hecker lives in Mercer, Wisconsin, within the Western District of Wisconsin. He is a participant in the John Deere Tax Deferred Savings Plan within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7).

13. Plaintiff and Class Representative Jonna Duane lives in Madison, Wisconsin, within the Western District of Wisconsin. She is a participant in the John Deere Savings & Investment Plan within the meaning of ERISA § 3(7), 29 U.S C. § 1002(7).

14. Plaintiff and Class Representative William Wallace lives in Horicon, Wisconsin. He is a participant

in the John Deere Tax Deferred Savings Plan within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7).

15. Plaintiff and Class Representative Roger Bradley lives in Beaver Dam, Wisconsin. He is a participant in the John Deere Tax Deferred Savings Plan within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7).

16. Plaintiff and Class Representative Janice Riggins lives in Coal Valley, Illinois. She is a participant in the John Deere Savings & Investment Plan within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7)

Defendants

17. Defendant Deere & Company ("Deere") manufactures heavy equipment for use in the agriculture, construction, forestry and landscaping sectors. It is one of the world's two leading agricultural machinery manufacturers and employs more than 47,000 people in 26 countries. Within the United States, it has major operations in Illinois, Wisconsin, Minnesota, North Dakota, Iowa, Louisiana, and Georgia. It is registered to do business in Wisconsin and employs several hundred people at its Madison and Horicon facilities

18. Deere is the sponsor of the Plans within the meaning of ERISA § 3(16)(B), 29 U S.C § 1002(16)(B), and is also an administrator of the Plans within the meaning of ERISA § 3(16)(A), 29 U.S C § 1102(16)(A). In its role as administrator, it has the authority and

discretion to select the investments available to Plan participants and beneficiaries, and to control and manage the operation and administration of the Plans. It is a "named fiduciary" within the meaning of ERISA § 402, 29 U.S.C. § 1102, and is also a fiduciary with respect to the Plans within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).

19. Defendant Fidelity Management Trust Company ("FMTC") is a Massachusetts corporation with its headquarters in Boston. FMTC is a trust company and manages assets for approximately 550 institutional clients worldwide with $113 billion in assets under management as of March 2006. FMTC is a subsidiary of Fidelity Investments, one of the world's largest money managers.

20. Because ERISA requires that the assets of the Plans be held in trust, pursuant to a written trust agreement, ERISA, § 403, 29 U.S C. § 1103(a), Defendant Deere, as Plan sponsor and administrator, designated FMTC the trustee of the Plans. In addition, FMTC is the Plans' record keeper, performing a variety of administrative tasks for the Plans FMTC also directly manages at least two of the investment options available to Plan participants in each of the Plans and is thus a fiduciary to the Plans within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).

21. FMTC also played a role in the selection of the investment options the Plans make available to participants. Although Deere as Plan Administrator had

final authority for the selection of the investment options, Deere and FMTC agreed that Deere would limit its selection to those securities issued by investment companies for which FMTC's affiliate company, Fidelity Management & Research Company, serves as investment advisor or for which FMTC itself provides investment advice, subject to an exception for certain pre-existing guaranteed investment contracts (GICs) and the Deere Common Stock Fund For these reasons, FMTC is a fiduciary for both Plans pursuant to ERISA § 3(21)(A), 29 U.S.C § 1002(21)(A).

22 Defendant Fidelity Management & Research Company ("FMRCo") is a subsidiary of Fidelity Investments and an affiliate of FMTC. FMRCo is a registered investment company that acts as the leading manager and investment advisor to the Fidelity family of mutual funds and other fiduciary accounts. The Fidelity funds are marketed throughout the United States through a variety of distribution channels, including Fidelity investment centers and over the internet at Fidelity.com. FMRCo exercises discretion in the selection of the investment options the Plans make available to participants and has an obligation to obtain and analyze all material information in selecting these options. In addition, FMRCo exercises discretion over Plan assets when it decides how much Revenue Sharing to send to Fidelity affiliates, like FMTC, and thus offset the Plans' expenses. For these reasons, FMRCo is a fiduciary for both Plans pursuant to ERISA § 3(21)(A), 29 U.S.C § 1002(21)(A).

23. For each Plan, FMRCo is the investment advisor for 23 out of the 26 investment options available to Plan participants. It is paid by the Plans (and thus by the participants and beneficiaries) for its services. It maintains an active Revenue Sharing program, charging more for its services than it expects to keep in order to have additional monies with which to pay its affiliates and business partners. FMTC and FMRCo are referred to herein as "Fidelity."

***Jurisdiction And Venue*:**

24. Plaintiffs seek relief on behalf of the Plans through the mechanisms found in ERISA § 409, 29 U.S.C. § 1109, and ERISA § 502, 29 U S.C § 1132. Therefore, this Court has jurisdiction pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1).

25. The Defendants are subject to service of process issued from this Court pursuant to 29 U.S.C. § 1132(e)(1)(2).

26 Venue of this action is proper pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), because the injury occurred directly to Plaintiffs in this district where they live and work, because the breaches of fiduciary duty occurred in this district and because the Defendants may be found in this district

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The Plaintiff Class

27. Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure, on behalf of themselves and all similarly situated Plan participants and beneficiaries. They seek to represent the following two classes (herein referred to as "Class" or "Classes"):

> All persons, *excluding individual employees who are or may be liable for the conduct described in this Complaint*, who are or were participants or beneficiaries of the John Deere Savings & Investment Plan, Plan No. 003, and who are, were or may have been affected by the conduct set forth in this Complaint, as well as those who will become participants or beneficiaries of the Plan in the future.
>
> and
>
> All persons, *excluding individual employees who are or may be liable for the conduct described in this Complaint*, who are or were participants or beneficiaries of the John Deere Tax Deferred Savings Plan, Plan No. 008, and who are, were or may have been affected by the conduct set forth in this Complaint, as well as those who will become participants or beneficiaries of the Plan in the future.

28. Certification of each these Classes is proper under Rule 23(a) because all of its prerequisites are satisfied:

a. **Numerosity.** The members of each Class is so numerous that joinder of all members is impracticable. Although the Plaintiffs do not know the exact number of class members as of the date of filing, there were 21,009 participants with account balances in the John Deere Savings & Investment Plan at the end of the 2004 plan year, and 10,186 participants with account balances in the John Deere Tax Deferred Savings Plan at the end of the 2004 plan year.

b. **Commonality.** Common issues of fact and law predominate over any issues unique to individual class members. Issues that are common to all class members include, but are not limited to, whether one or more of the Defendants:

   i. Charged fees and expenses to the Plans that were, or are, unreasonable and/or not incurred solely for the benefit of Plan participants;

   ii. Caused the Plans to enter into agreements which in turn caused and/or allowed the Plans to pay fees and expenses that were, or are, unreasonable and/or not incurred solely for the benefit of Plan participants,

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iii. Failed to monitor the fees and expenses paid by the Plans and, by such failure, caused or allowed the Plans to pay fees and expenses that were, or are, unreasonable and/or not incurred solely for the benefit of Plan participants;

iv. Failed to inform themselves of, and understand, the various methods by which vendors in the 401(k) retirement industry collect payments and other revenues from 401(k) plans;

v. Failed to establish, implement, and follow procedures to properly and prudently determine whether the fees and expenses paid by the Plans were reasonable and incurred solely for the benefit of Plan participants;

vi. Failed properly to inform and/or disclose to Plan participants the fees and expenses that are, or have been, paid by the Plans;

vii. Failed to inform and/or disclose to Plan participants in proper detail and clarity the transaction fees and expenses which affect participants' accounts balances in connection with the purchase or sale of interests in investment alternatives;

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viii Failed to disclose that hidden and excessive fees were and are being assessed against Plan assets and failed to stop such hidden excessive fees;

ix. Failed to exercise the care, skill, prudence, and diligence that a prudent person would when acting in like capacity and familiar with such matters when charging, causing to be charged or paid, or failing to monitor the fees and expenses of the Plans;

x. Caused and/or allowed fees and expenses to be paid by the Plans for purposes other than those allowed by ERISA;

xi. Breached their fiduciary and other ERISA-imposed obligations to the Plans, Plan participants, and members of the Classes by engaging in the conduct set forth in this Complaint, revealed in discovery and/or proven at trial;

xii Are liable to the Plans and the Classes for losses suffered as a result of the breaches of their fiduciary and other ERISA-imposed obligations;

xiii. Are responsible to account for the assets and transactions of the Plans and should be charged for any transactions and payments for which they cannot account;

xiv. Are responsible in equity to make restitution of monies that in good conscience belong to each Plan and the participants and beneficiaries.

c. **Typicality.** The Claims brought by the Plaintiffs are typical of those of the absent class members because:

i. The Defendants owed the exact same fiduciary and other ERISA-based obligations to each Plan participant and each member of both Classes;

ii. The Defendants' breach of those obligations constitutes a breach to each Plan participant and each member of both Classes;

iii. To the extent that there are any differences among the Class members' damages, such differences would be a product of simple mathematics based upon their account balances in the Plans. Such minimal and formulaic differences are no impediment to class certification

d. Adequacy of Representation. The Plaintiffs are adequate representatives of the absent class members and will protect such absent class members' interests in this litigation. The Plaintiffs do not have any interests

antagonistic to the other class members nor do they have any unique claims or defenses that might undermine the efficient resolution of the class claims. Plaintiffs have retained competent counsel, versed in ERISA, class actions, and complex litigation.

29. Class certification is also appropriate under Rule 23(b) and each subpart because:

a Pursuant to Rule 23(b)(1), in the absence of certification, there is a risk of inconsistent adjudications with respect to individual class members and adjudications with respect to individual class members would be dispositive of the interests of the other members not parties to the adjudications or would substantially impair or impede their ability to protect their interests;

b Pursuant to Rule 23(b)(2), as set forth above, the Defendants have acted on grounds generally applicable to each Class as a whole;

c. Pursuant to Rule 23(b)(3), as set forth above, common issues of law and fact predominate over any purely individual issues and thus a class action is superior to any other method for adjudicating these claims.

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FACTS

The Plans

30. Deere offers certain of its employees the opportunity to participate in the Plans, as part of their compensation and benefits. Each Plan is a "defined contribution plan," as defined in ERISA § 3(34), 29 U.S.C. § 1002(34) and contains an employee stock ownership plan provision. Each Plan is also a tax-qualified plan of the type popularly known as a "401(k) plan."

31. Deere benefits from its sponsorship of the Plans because giving employees the opportunity to participate in the Plans enhances Deere's ability to recruit and retain qualified personnel, fosters employee loyalty and goodwill, and entitles Deere to tax advantages under the Internal Revenue Code.

Savings & Investment Plan

32. The Savings & Investment Plan ("SIP") was established and is operated under a Plan Document. Under the terms of the SIP qualified employees may contribute certain portions of their before-tax earnings to the Plan. Deere will match those contributions in varying percentages up to 6%. It may also make a profit-sharing contribution to some participants All participants are 100 percent vested in their contributions and allocated net earnings. Some participants — those electing the "Traditional Option"

— are 100% vested in the matching contribution portion at all times, while other participants — those electing the "Contemporary Option — are not fully vested in their matching contributions until after three years of service.

33 Each participant's account is credited with the participant's contributions, the participant's share of Deere's matching contributions and discretionary profit-sharing contributions, if any, and the SIP's earnings and losses allocated daily based on the ratio of the participants respective account balances. FMTC, in its role as Plan record keeper, has the responsibility for keeping track of the individual accounts.

34. As noted above, the assets of the SIP are held in the "John Deere Savings and Investment Plan Trust." In 1990, Defendants Deere and FMTC entered into a trust agreement in which FMTC agreed to provide trustee and recordkeeping services to the SIP, and to be a fiduciary with respect to certain investments.

35. In the document, which has been amended at least 27 times without substantially changing this provision, FMTC disavows any responsibility for selecting the investment options or for rendering advice regarding the selection of investment options. However, the parties agreed that Deere's selection of mutual funds would be limited to funds operated, managed, and/or advised by Fidelity, with an exception for certain pre-existing investments and for the company stock fund.

36. Thus, as of approximately 2004, participating employees could invest Plan contributions in any of 26 investment options selected by Deere subject to the limitations imposed in the agreement with FMTC. Twenty-three of the available options are retail mutual funds operated and managed by FMRCo — the same mutual funds that FMRCo and its parent Fidelity Investments make available to investors large or small on the open market.

37. In addition to the retail mutual funds, the SIP offers two funds managed directly by Fidelity, the "Blended Interest Fund" and the "Fidelity Intermediate Collective Pool." These two options are similar to mutual funds in that they pool money and invest in many different underlying securities. FMTC acts as the investment advisor to these two funds, choosing the amount of each security held. In the agreement, it acknowledges that it is a fiduciary with respect to these funds.

38. The SIP also offers participants the option of investing in the Deere Common Stock Fund, a fund that holds Deere & Company common stock.

39. By the end of 2005, the SIP had more than $2 billion in assets. More than $1 3 billion of those Plan assets are held in Fidelity retail mutual funds.

Tax Deferred Savings Plan

40. The Tax Deferred Savings Plan ("TDS Plan") was established in 1987, and is operated under Plan

Documents. Under the terms of the TDS Plan, qualified employees may contribute certain portions of their before-tax earnings to the Plan. Deere will match those contributions in varying percentages up to 6%. All participants are 100 percent vested in their contributions and allocated net earnings. The Deere matching contributions are vested after a participant has three years of service with the company.

41. Each participant's account is credited with the participant's contributions, the participant's share of Deere's matching contributions, and the Plan's earnings and losses allocated daily based on the ratio of the participants respective account balances. FMTC, in its role as Plan record keeper, has the responsibility for keeping track of the individual accounts.

42. As noted with the SIP, the assets of the TDS Plan are held in trust. Also, as with the SIP, in addition to being the record keeper, FMTC is the Trustee and Investment Manager for the TDS Plan. In addition, FMTC is a fiduciary with respect to certain TDS Plan investments.

43. As with the SIP, the selection of mutual funds made available in the TDS Plan are limited to funds operated, managed, and/or advised by Fidelity, with an exception for certain pre-existing investments and for the company stock fund.

44 Thus, as of approximately 2004, participating employees could invest TDS Plan contributions in any

of 26 investment options selected by Deere subject to the limitations imposed in an agreement with FMTC. Twenty-three of the available options are retail mutual funds operated and managed by FMRCo — the same mutual funds that FMRCo and its parent Fidelity Investments make available to investors large or small on the open market.

45. In addition to the retail mutual funds, the TDS Plan offers two funds managed directly by Fidelity, the "Blended Interest Fund" and the "Fidelity Intermediate Bond Commingled Pool." These two options are similar to mutual funds in that they pool money and invest in many different underlying securities. FMTC acts as the investment advisor to these two funds, choosing the amount of each security held. FMTC is a fiduciary with respect to these funds.

46. The TDS Plan also offers participants the option of investing in the Deere & Company Common Stock Fund, a fund that holds Deere & Company common stock. By the end of 2005, the TDS Plan had more than $500 million in assets. More than $244 million of those TDS Plan assets are held in Fidelity retail mutual funds.

Fiduciary Duties Owed To The Plan Under ERISA

47. ERISA §403(c)(1), 29 U.S.C §1103(c)(1), unambiguously mandates that:

> [T]he assets of a plan shall never inure to the benefit of any employer and shall be held for

> the **exclusive purposes of providing benefits** to participants in the plan and their beneficiaries **and defraying reasonable expenses of administering the plan.**

(Emphasis added).

48. ERISA §§ 404(a)(1)(A)&(B) of ERISA, 29 U.S.C. § 1104(a)(l)(A) & (B), require that Plan fiduciaries, including the Defendants, "shall discharge [their] duties with respect to a plan solely in the interest of the participants and beneficiaries" and:

a. [F]or the exclusive purpose of:

   i. providing benefits to participants and their beneficiaries; and

   ii defraying reasonable expenses of administering the plan, and

b. [W]ith the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

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49 ERISA § 405(a), 29 U.S.C. § 1105(a), provides that one fiduciary may be held liable for breaches of fiduciary duty committed by another fiduciary where

> (1) the fiduciary "participates knowingly in or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach";
>
> (2) the fiduciary, by his or her "failure to comply with section 1104(a) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary" enables "such other fiduciary to commit such a breach"; or
>
> (3) the fiduciary "has knowledge of a breach by such other fiduciary," and does not make "reasonable efforts under the circumstances to remedy the breach."

50 ERISA § 406, 29 U.S.C. § 1106, prohibits certain transactions between a plan and "parties in interest." This section provides that unless subject to an exemption as set forth in ERISA § 408, 29 U.S.C § 1108, a fiduciary

> shall not cause the plan to engage in a transaction . . . if he knows or should know that such a transaction constitutes a direct or indirect — sale or exchange, or leasing, of any property between the plan and a party in

> interest . . . furnishing of goods, services or facilities between the plan and a party in interest . . . transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan.

29 U.S.C. § 1106(a)(1).

51. For purposes of section 406, a "party in interest" is any plan fiduciary, including the plan administrator, trustee, officer or custodian, any plan services provider, the employer, a relative of any of the above, and certain persons with ownership or leadership roles in any of the above. ERISA § 3(14), 29 U.S.C. § 1002(14).

52. Similarly, a fiduciary such as Deere or Fidelity (1) shall not "deal with the assets of the plan in his own interest or for his own account"; (2) shall not "act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan" or its participants and beneficiaries; and (3) shall not "receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan." 29 U S C. § 1106(b).

53. ERISA §104(b)(1), 29 U.S.C. § 1024(b)(1), requires that Deere, as the Plan Administrator, periodically provide to Plan participants and beneficiaries a summary plan description (an "SPD").

54. ERISA § 104(b)(3), 29 U.S.C. § 1024(b)(3), requires that Deere, as the Plan Administrator, at least annually provide to Plan participants and beneficiaries copies of statements and schedules from the Plans' annual report for the previous year, and such additional information "as is necessary to fairly summarize the latest annual report."

55. The schedules and statements that Deere, as the Plan Administrator, annually must provide to Plan participants and beneficiaries specifically include:

> a. [A] statement of the assets and liabilities of the plan aggregated by categories and valued at their current value, and the same data displayed in comparative form for the end of the previous fiscal year of the plan; and
>
> b. [A] statement of receipts and disbursements during the preceding twelve-month period aggregated by general sources and applications.

See ERISA §103(b)(3), 29 U S.C. §1023(b)(3)

56. ERISA §104(b)(4), 29 U S C § 1024(b)(4), entitles Plan participants and beneficiaries to receive more detailed information from Deere, as the Plan Administrator, on request:

> The administrator shall, upon written request of any participant or beneficiary, furnish a

> copy of the latest updated summary, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated.

57. ERISA §103(b)(2)&(3), 29 U.S.C. § 1023(b)(2) &(3) mandates that, among other extensive disclosures, Deere, as a Plan fiduciary, must include in a Plan's "Annual Report"

> a statement of [the Plan's] assets and liabilities, and a statement of changes in net assets available for plan benefits which shall include details of revenues and expenses and other changes aggregated by general source and application

58. ERISA § 404(c) provides to Plan fiduciaries a "Safe Harbor" from liability for losses that a participant suffers in his or her 401(k) accounts to the extent that the participant exercises control over the assets in his or her 401(k) accounts. To be eligible for the protection of this "safe harbor," Deere, as a Plan fiduciary, must, among other things, have provided:

> a an opportunity for a participant or beneficiary to exercise control over assets in his individual account, and
>
> b. a participant or beneficiary an opportunity to choose, from a broad range of investment alternatives, the manner in which some or all of the assets in his account are invested

29 C F.R §2550.404c-1(b)(1).

59. For a participant or beneficiary to have "an opportunity to exercise control over assets in his individual account," Plan fiduciaries must provide him or her with "the opportunity to obtain sufficient information to make informed decisions with regard to investment alternatives under the Plan." 29 C.F.R. §2550.404c-1(b)(2)(B).

60 The "sufficient investment information" that Deere, as a Plan fiduciary, must have provided includes:

> A description of any transaction fees and expenses which affect the participant's or beneficiary's account balance in connection with purchases or sales of interests in investment alternatives (e.g., commissions, sales load, deferred sales charges, redemption or exchange fees).

29 C.F.R. §2550.404c-l(b)(2)(i)(B)*(1)(v)*. At least upon request, it must include

> A description of the annual operating expenses of each designated investment alternative (e.g., investment management fees, administrative fees, transaction costs) which reduce the rate of return to participants and beneficiaries, and the aggregate amount of such expenses expressed as a percentage of average net assets of the designated investment alternative

29 C.F.R. §2550 404c-1(b)(2)(i)(B)*(2)(i)*.

61. ERISA's Safe Harbor Regulations state that the imposition of *reasonable* charges for *reasonable* Plan expenses does not interfere with a participant's opportunity to exercise control over his or her individual account so long as *Plan fiduciaries inform the participant* of such actual expenses:

> A plan may charge participants' and beneficiaries' accounts for the reasonable expenses of carrying out investment instructions, *provided that procedures are established under the plan to periodically inform such participants and beneficiaries of actual expenses incurred with respect to their respective individual accounts.*

29 C.F.R. §2550 404c-1(b)(2)(ii)(A) (emphasis added).

The Fees and Expenses Assessed Against The Plans

62. Defendant Deere, directly or indirectly, has caused the Plans to purchase services from various plan service providers, including trustee, record-keeping, administration, investment advisory, investment management, brokerage, insurance, consulting, accounting, legal, printing, mailing, and other services.

63. Plan service providers, such as Fidelity, receive payment in at least one of two ways:

a. By direct disbursement from the Plan, and/or

b. By receiving, or having the opportunity to receive, "Revenue Sharing" payments comprised of Plan assets distributed between and/or among various service providers.

"Hard Dollar" Payments to Plan Service Providers

64. Payments in the form of direct disbursements from a 401(k) plan to participants or an entity providing a service to the plan are characterized as "Hard Dollar" payments.

65. 401(k) plans must disclose to government regulators and plan participants, in one form or another, Hard Dollar payments made from the plan to service providers.

66 The Plans have stated in filings with the government regulators that the Plans pay no administrative expenses. Upon further inquiry by participants, the Plans stated that Deere, as Plan Sponsor, pays all of the expenses of the Plans in accordance with the Plan documents.

67 Whether or not this is correct with respect to Hard Dollar expenses, these Hard Dollar expenses are not all of the fees that Fidelity charges or collects in exchange for the services it provides to the Plans

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Revenue Sharing Payments to Plan Service Providers

68. Revenue Sharing is a common practice in the financial, securities, and investment industry that provides services to 401(k) plans.

69. Industry commentators and analysts consider Revenue Sharing to be the "big secret of the retirement industry."

70. Industry commentators and analysts generally define "Revenue Sharing" as the transfer of asset-based compensation from brokers or investment management providers (such as the mutual funds advised and managed by FMRCo, and also common or collective trusts, insurance companies offering GICs, and similar pooled investment vehicles) to administrative service providers (such as FMTC in its role as record-keeper and trustee, as well as administrators and/or consultants) in connection with 401(k) and other types of defined contribution plans.

71. For example, a plan or its agent (a third-party administrator, consultant, or similar fiduciary) seeking to select an investment vehicle (mutual fund, common or collective trust, guaranteed investment contracts, etc. (collectively "Fund")) to be offered to plan participants as an investment option will negotiate an agreement that sets the costs assessed against each dollar invested by specifying the expense ratio and available Revenue Sharing.

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72 In Revenue Sharing arrangements, the plan and the Fund agree upon an asset-based fee that is not the true price for which the Fund will provide its service.

73. Instead, the Fund's agreed asset-based fee includes ***both*** the actual price for which the Fund will provide its service ***and*** additional amounts that the Fund does not need to cover the cost of its services and to make a profit.

74. The additional portion of the agreed-upon asset-based charge is "shared" with plan service providers or others who do business with the plan or the Fund.

75 As a result of Revenue Sharing arrangements, plan service providers, such as Fidelity, or others who do business with the plan or the Fund receive *both* a Hard Dollar payment from the plan *and* additional revenue that the Fund "shares" with them.

76 The total fees a Fund charges to a plan can vary widely based upon a number of factors, including without limitation the amount invested; the level of sophistication of the plan fiduciary negotiating the fee agreement; the plan fiduciary's awareness of Revenue Sharing and inclination to expend effort monitoring Revenue Sharing transfers; the diligence with which the plan's representative conducts such negotiations; and the separate financial interests and/or agendas of the plan fiduciary and the Fund as they negotiate

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77. Revenue Sharing also occurs between and among brokerage firms, investment managers, fund families and other service providers.

78. When 401(k) plan service providers receive compensation in the form of both Hard Dollar fees *and* Revenue Sharing payments, determining the total amount of fees and expenses that the plan incurs for any category of services (*i.e.* recordkeeping and administration, investment advisory, trustee, auditing, and accounting, etc.) requires that *both* the Hard Dollar fees *and* Revenue Sharing payments be taken into account.

79. Ascertaining whether the Plan Administrator — in this case Deere —has fulfilled its fiduciary obligation to ensure that the fees and expenses assessed against the 401(k) plan are reasonable and incurred solely in the interest of plan participants requires consideration whether the *total of both* the Hard Dollar *and* Revenue Sharing payments paid for any category of services complies with this standard.

80 It is especially important to consider the Revenue Sharing payments because they are based on the total assets under management, rather than on the number of participant accounts serviced Thus, as the years pass, and the participants' retirement savings grow, the amount of money available for Revenue Sharing payments increases, even though no additional services may be provided to the plan

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81. Although Revenue Sharing monies arise only as a result of, and in connection with, transactions involving the plan, plan assets and plan service providers; Revenue Sharing is not always captured and used for the benefit of the plan and the participants.

82. When Revenue Sharing is foregone, the plan will not only pay additional Hard Dollar fees to the plan service providers (since no Revenue Sharing payments are available to offset those Hard Dollar costs), but it will also pay additional money to the Fund, beyond what the Fund would normally charge and keep.

83. Consequently, in determining whether a plan administrator or other fiduciary has fulfilled its obligation to ensure that the fees and expenses assessed against the plan are reasonable and incurred solely in the interest of plan participants, foregone Revenue Sharing must also be taken into account.

84. Such is the case here. The Plans and the participants and beneficiaries of the Plans have been charged fees and expenses that include monies with which to make Revenue Sharing payments. In many cases, the amounts allocated for Revenue Sharing payments are more than 1/3 of the total amount collected by Fidelity and its affiliates that operate the mutual funds.

85. In this case, these Revenue Sharing amounts were retained by Fidelity and its affiliates as fees for their services. The Revenue Sharing payments kept by

Fidelity and its affiliates are in addition to any Hard Dollar Fees paid directly to them by the Plans or by Deere.

86. These Revenue Sharing amounts are in excess of the fees that Fidelity would retain if non-affiliated plan service providers were involved. Fidelity was able to retain these additional payments because the Plans employ FMTC as both recordkeeper and trustee and because it uses investment options advised and managed by FMRCo and operated by other Fidelity affiliates.

87. These Revenue Sharing payments — consisting of millions of dollars — were far in excess of reasonable fees for the administrative and/or investment services provided to the Plans by the Fidelity affiliates and far in excess of what plans of this type must pay for similar services or investment options

Revenue Sharing Arrangements Are Not Disclosed to Plan Participants

88. Revenue Sharing is not disclosed to Plan participants and government regulators, even though it accounts for a greater portion of service provider payments than do hard Dollar disbursements to those same providers.

89. Accordingly, industry commentators and experts have dubbed Revenue Sharing payments to be "hidden fees" that are assessed against 401(k) plans and thus reduce plan participants' retirement savings.

90. By entering into agreements with FMTC, FMRCo and other Fidelity affiliates, and by allowing, and/or failing to monitor, discover, and prevent or recover these undisclosed Revenue Sharing arrangements, Deere deprived Plan participants of true and accurate information regarding:

a. How much they are paying in fees and expenses for each Plan;

b. Who is receiving Plan assets through Revenue Sharing;

c. How much specific service providers are paid by the Plans; and

d. Whether the total amount paid to services providers (*i e.* disclosed, hard dollar fees *combined with* Revenue Sharing payments) is reasonable and incurred solely for the participants' benefit.

Defendants' Non-Compliance with §404(c)'s Safe Harbor Requirements and Concealment of Its Fiduciary Breaches

91. Neither Deere nor Fidelity disclosed, and to this day have not disclosed, the fact that Fidelity and/or other plan service providers were engaging in Revenue Sharing. They did not disclose that Revenue Sharing was available for the benefit of the Plans and the participants, and they did not disclose the amount of Revenue Sharing payments, made by or to Plan service providers.

92. In fact, Deere stated exactly the opposite when asked.

93. Plan participants did not have, and do not have, complete and actual knowledge of the fees and expenses being charged to the Plans that reduced their account balances.

94. Thus, the Plans' fiduciaries, including Defendants, have not told Plan participants, and Plan participants do not know:

a. the "annual operating expenses" of the investment options in the Plans, as required by 29 C.F.R §2550.404c-1(b)(2)(i)(B)*(2)(i)*; and

b. the actual expenses incurred with respect to their respective individual accounts, as required by 29 C.F.R. §2550.404c-1(b)(2)(ii)(A).

95. As a result of Defendants' failure and refusal to provide accurate information, and the general failure on the part of either Deere or Fidelity to disclose the actual Plans' expenses, and the specific amounts paid to specific service providers, including the available Revenue Sharing and the fact that Deere and Fidelity have long-standing agreements that Deere will only choose Fidelity-related funds for the Plans, the participants have not been provided with "the opportunity to obtain sufficient information to make

informed decisions with regard to investment alternatives under the plan." 29 C.F.R. §2550.404c-1(b)(2)(1)(B).

96 Because none of the Defendants has provided the participants with this information, and because the Defendants concealed this information from them, the participants have lacked the information necessary to understand and protect their interests in the Plans and/or to have knowledge of, these Defendants' breaches of fiduciary duty.

97. In fact, in their fiduciary roles, Deere and Fidelity are the parties with the information necessary to know and understand whether the participants' rights and protections under ERISA are being, or have been, violated.

98 Defendants have an affirmative obligation to provide full and accurate information to Plan participants regarding the administration of the Plans.

99. Their silence and/or non-disclosure in the face of such a duty to disclose is tantamount to an affirmative misrepresentation

100. Here, despite the duty to disclose full and accurate information regarding the fees and expenses assessed against participants' accounts, on an ongoing basis these Defendants failed and refused to disclose to, and inform the participants of·

a. the total amount of fees and expenses reasonable and necessary to operate the Plans;

b. the total amount of amount of fees and expenses the Plans actually paid to service providers;

c. the availability of Revenue Sharing;

d. the true and accurate details regarding the revenues and expenses of the Plans;

e. the true and accurate operating expenses which reduce participants' returns, including both Hard Dollar payments and Revenue Sharing, for each of the Plans' investment alternatives;

f. the true and accurate transaction fees and expenses which affect the participants' account in connection with the purchase or sale of investment alternatives,

g the amount, when both Hard Dollar Payments and Revenue Sharing are considered, by which the Plans' expenses exceeded those which were reasonable and incurred solely in participants' interests;

h. other revenue and expense information necessary for the participants to understand and protect their interests in the Plans; and,

i the Defendants' agreement to limit the Plans' investment options to Fidelity affiliated funds, thereby benefiting Fidelity and/or other Fidelity affiliates.

101. Based upon the foregoing, the Defendants are not entitled to the safe harbor protections of ERISA § 404(c).

102. Based upon the foregoing, the statue of limitations was tolled on the breaches set forth in this Complaint and did not begin to run until such time as Plaintiffs actually discovered them.

COUNT I:
Breach of Fiduciary Duty Against Defendants Deere, FMTC and FMRCo
ERISA §502(a)(2)

103. Plaintiffs restate and incorporate the allegations contained in paragraphs 1 through 102 as though fully set forth here.

104. As set forth in detail above, Defendants owe the Plans, the participants and beneficiaries, and the Classes extensive fiduciary duties including, without limitation:

a. To conduct themselves as Plan fiduciaries with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent ERISA professional fiduciary

would in operating and administering a 401(k) plan the size and character of the Plans;

b. To perform their duties as fiduciaries with the utmost loyalty and fidelity to the Plans and the participants and beneficiaries, avoiding at all times conflicts of interest, self-interest, and duplicity,

c. To ensure, at all times, that Plan assets "shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the Plan and their beneficiaries and defraying reasonable expenses of administering the Plan;"

d. To track and account for all transactions involving the Plans and the Plans' assets so as to ensure that the Plans' assets are retained, managed, and disbursed in compliance with the Plans' Documents and ERISA;

e To track and account for all transactions involving the Plans and the Plans' assets so as to ensure that the Plans' assets "never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the Plan and their beneficiaries and defraying

reasonable expenses of administering the Plan;"

f. To ensure that the fees and expenses incurred by the Plans are reasonable and incurred for the sole and exclusive benefit of Plan participants and beneficiaries;

g. In entering into agreements with service providers to the Plans, or in Fidelity's ease, in entering into agreements with Deere, to ensure that the payments from the Plans — whether they are direct or indirect — are reasonable for the services provided and made for the sole and exclusive benefit of the Plans' participants and beneficiaries;

h. In operating and administering the Plans, to establish, implement, and follow procedures to properly and prudently determine whether the fees and expenses paid by the Plans were reasonable and incurred solely for the benefit of the Plans' participants,

i In operating, managing, advising, and administering the Plans, on an ongoing basis to monitor the payments made by the Plans to service providers, advisors, and/or managers such as Fidelity — whether they are direct or indirect — are and remain reasonable for the services provided and

made for the sole and exclusive benefit of the Plans' participants and beneficiaries;

j. To inform themselves of, and understand, the various methods by which vendors in the 401(k) industry, including Fidelity and other Fidelity affiliates, collect payments and other revenues from 401(k) plans;

k. To inform themselves of trends, developments, practices, and policies in the retirement, financial investment and securities industry which affect the Plans; and to remain aware and knowledgeable of such trends, practices and policies on an ongoing basis;

l. To communicate with Plan participants and beneficiaries regarding the Plans honestly, clearly and accurately;

m. To affirmatively and without request provide Plan participants and beneficiaries with honest, accurate and complete information they need to understand their investments in the Plans; the management, risk, potential returns of such investments, and the fees and expenses incurred in connection with those investments;

n. Upon request, to provide further any information to Plan participants and

beneficiaries regarding the operation and administration of the Plans and the expenses incurred in doing so; and

o. To provide honest, accurate and complete information to Plan participants and beneficiaries regarding the costs associated with their various investment choices and directions.

105. As set forth in detail above, Deere and/or Fidelity breached their fiduciary obligations to the Plans, the Plans' participants and beneficiaries and the Classes by, among other conduct to be proven at trial, one or more of the following acts.

a. Agreeing that the Plans would pay — directly or indirectly — fees and expenses that were, or are, unreasonable and/or not incurred solely for the benefit of the Plans' participants and beneficiaries;

b. Allowing or causing the Plans to pay — directly on indirectly — fees and expenses that were, or are, unreasonable and/or not incurred solely for the benefit of the Plans' participants and beneficiaries,

c. Failing to monitor the fees and expenses paid by the Plans and, by such failure, causing and/or allowing the Plans to pay fees and expenses that were, or are,

unreasonable and/or not incurred solely for the benefit of the Plans' participants and beneficiaries;

d. Failing to inform itself of trends, developments, practices, and policies in the retirement, financial investment and securities industry which affect the Plans; and failing to remain aware and knowledgeable of such trends, practices and policies on an ongoing basis;

e. Failing to inform itself of, and understand, the various methods by which vendors in the 401(k) industry collect payments and other revenues from 401(k) plans;

f. Failing to establish, implement, and follow procedures to properly and prudently determine whether the fees and expenses paid by the Plans were reasonable and incurred solely for the benefit of the Plans' participants;

g. Failing to communicate with Plan participants and beneficiaries regarding each Plan honestly, clearly and accurately;

h. Failing properly to inform and/or disclose to Plan participants the fees and expenses that are, or have been, paid by the Plans;

i. Failing to inform and/or disclose to Plan participants in proper detail and clarity the transactions, fees and expenses which affect participants' accounts balances in connection with the purchase or sale of interests in investment alternatives;

j. Failing to discover, disclose and stop the charging of hidden and excessive fees to the Plans;

k. By the foregoing conduct, failing to exercise the care, skill, prudence and diligence that a prudent person would when acting in like capacity and familiar with such matters.

106. As set forth in detail above, as a result of these breaches, Plaintiffs, the Classes, the Plans; and the Plans' participants and beneficiaries have suffered financial losses and damages.

107. Further, as set forth in detail above, the Defendants failed to provide participants and beneficiaries with sufficient investment information to qualify for the Safe Harbor immunity of ERISA § 404(c), 29 U.S.C. § 1104(c) Accordingly, the Defendants are not able to make use of this section to avoid liability for any investment losses participants and beneficiaries may have experienced in the Plans caused by the above-referenced breaches

108. Pursuant to ERISA § 409, 29 U.S.C. § 1109, and ERISA § 502(a), the Defendants are liable to restore to the Plans the losses experienced as a direct result of the Defendants' breaches of fiduciary duty and are liable for any other available and appropriate equitable relief, including prospective injunctive relief and declaratory relief, and attorney's fees

COUNT II:
Other Remedies for Breach of Fiduciary Duty Against Deere, FMTC and FMRCo — ERISA §502(a)(3)

109. Plaintiffs restate and incorporate the allegations contained in paragraphs 1 through 108 as though fully set forth here.

110. As an alternative to the causes of action stated in Count I, Plaintiffs seek further relief pursuant to ERISA § 502(a)(3), 29 U.S.C., § 1132(a)(3).

111. Under section 502(a)(3), a participant may enjoin any act which violates ERISA or may obtain other appropriate equitable relief to redress such violations or enforce the terms of ERISA.

112. Defendants are the primary fiduciaries of the Plans and occupy a position of trust and confidence in connection with the Plans, the Plans' assets, and the Plans' participants and beneficiaries.

113. These Defendants have exclusive discretion and control over the Plans' assets and are strictly obligated to exercise that control "for the exclusive purposes of providing benefits to participants in the Plan and their beneficiaries and defraying reasonable expenses of administering the Plan."

114. Although *only* Plan participants and beneficiaries are entitled to Plan assets and to the benefit of Plan assets, in the absence of full and candid disclosure from the Defendants, Plan participants and beneficiaries do not know, and have no means of knowing, how their assets have been managed and disbursed.

115. Accordingly, these Defendants occupy the position of a common law trustee in connection with the Plans, the assets of the Plans, and the participants and beneficiaries of the Plans.

116. As set forth in detail above, these Defendants have caused and/or allowed the Plans to pay — directly or indirectly — excess fees and expenses to Plan service providers.

117. These Defendants, and not the Plaintiffs, are the entities which have and/or should have specific and detailed information regarding how Plan assets have been treated and disbursed in this regard.

118. Accordingly, the Court should order that these Defendants render an accounting of all transactions,

disbursements and dispositions occurring in, in connection with, and/or in respect of, the Plans and the assets of the Plans.

119. The Plaintiffs respectfully request that the Court order that such an accounting include, without limitation, detailed and specific information regarding all fees and expenses incurred by the Plans and/or paid to third parties, whether paid directly by the Plans or indirectly transferred among Plan service providers or other third parties.

120. Plaintiffs respectfully request that to the extent these Defendants do not or cannot account for all such transactions and their property under ERISA, Plan documents and other applicable law, the Court surcharge against these Defendants and in favor of the Plans all amounts for which they cannot account.

121. Plaintiffs further seek injunctive and other appropriate equitable relief to redress the wrongs described above, and to cause them to cease in order for the Plans' participants and beneficiaries to receive the full benefit of their retirement savings in the future.

COUNT III:
Other Remedies for Breach of Fiduciary Duty
Against FMTC and FMRCo
ERISA §502(a)(3)

122. Plaintiffs restate and incorporate the allegations contained in paragraphs 1 through 121 as though fully set forth here.

123. As a further alternative to the causes of action stated in Count 1, Plaintiffs seek further relief against Defendants FMTC and FMRCo pursuant to ERISA § 502(a)(3), 29 U.S.C , § 1132(a)(3).

124. One form of equitable relief available under section 503(a)(3) is equitable restitution.

125. By secretly charging the Plans for and retaining the Revenue Sharing payments described above, Defendants FMTC and FMRCo obtained funds that should have been used solely for the benefit of Plans' participants and beneficiaries for the exclusive purposes of providing benefits to participants in the Plans and their beneficiaries and defraying reasonable expenses of administering the Plans.

126. FMTC and FMRCo knew or should have known that those Revenue Sharing payments were the Plans' assets and that they should have been used solely for the benefit of the Plans' participants and beneficiaries for the exclusive purposes of providing benefits to participants in the Plans and their beneficiaries and defraying reasonable expenses of administering the Plans.

127. Because the Revenue Sharing payments were used for purposes not permitted by ERISA, these monies rightfully and in good conscience belong to the Plans, and the participants and beneficiaries of the Plans.

128. The Revenue Sharing payments are specifically identifiable funds

129. The Revenue Sharing payments are in the possession, control, and/or custody of FMTC or FMRCo.

130 Plaintiffs, on behalf of the Plans, seek equitable restitution of the Revenue Sharing payments, along with any profit, from FMTC and/or FMRCo.

WHEREFORE Plaintiffs, on behalf of the Plans and all similarly situated participants and beneficiaries of the Plans, respectfully request that the court:

- find and declare that the Defendants have breached their fiduciary duties as described above;

- order the Defendants to make good to the Plans all losses that the Plans incurred as a result of the conduct described above and to restore the Plans to the position they would have been in but for the breaches of fiduciary duty;

- impose a constructive trust on any monies by which the Defendants were unjustly enriched as a result of their breaches of fiduciary duty and/or cause the Defendants to disgorge such monies and return them to the Plans;

- remove any fiduciary who has breached his or her fiduciary duties and/or enjoin the fiduciary from future breaches of ERISA;

- award actual damages to the Plans in the amount of its monetary losses;

- require Defendants to render an accounting as set forth above;

- surcharge against Defendants and in favor of the Plans all amounts involved in transaction which such accounting reveals were or are improper, excessive and/or in violation of ERISA;

- permanently enjoin Defendants from breaching their fiduciary duties in each respect set forth in the Complaint;

- order costs and attorneys fees pursuant to ERISA § 502(g) and the common fund doctrine,

- order equitable restitution or other available equitable relief against the Defendants;

- order the payment of interest to the extent it is allowed by law; and grant any other and further relief the Court deems appropriate

PLAINTIFFS DEMAND A TRIAL BY JURY OF ALL COUNTS SO TRIABLE.

Dated: March 6, 2007

Respectfully submitted,

Schlichter, Bogard & Denton
s/ [illegible]
Jerome J Schlichter
Elizabeth J. Hubertz
Troy A. Doles
Nicole Bolton
100 South Fourth Street
Suite 900
St. Louis, MO 63102
Tel: 314-621-6115
Fax: 314-621-7151

Lead Counsel for Plaintiffs

SOLHEIM BILLING & GRIMMER S.C.
Kim Grimmer
Jennifer L. Amundsen
U.S Bank Plaza, Suite 301
One South Pinckney Street
PO. Box 1644
Madison, WI 53701
Tel: 608-282-1200
Fax. 608-282-1218

Local Counsel for Plaintiffs

APPENDIX B — RELEVANT STATUTE, EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, § 409, 29 U.S.C. § 1109

29 U.S.C.A. § 1109

§ 1109. Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary

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IN THE
Supreme Court of the United States

DENNIS HECKER, JONNA DUANE, AND JANICE RIGGINS,
Petitioners,

v.

DEERE & COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

JEROME J. SCHLICHTER
DANIEL V. CONLISK
SCHLICHTER, BOGARD & DENTON
100 South Fourth Street
Suite 900
St. Louis, Missouri 63102
(314) 621-6115

DAVID C. FREDERICK
Counsel of Record
DEREK T. HO
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

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Petition for Rehearing En Banc of Appellees, *Braden v. Wal-Mart Stores, Inc.*, No. 08-3798 (8th Cir. filed Dec. 9, 2009) 6

In departing from other circuits' law and Department of Labor ("DOL") settled policy, the Seventh Circuit held that pension plan participants cannot state a claim under ERISA for imprudent selection of retail mutual funds with unnecessarily high fees if the selected retail mutual funds have "a wide range of expense ratios." Pet. App. 19a. That holding functionally negates any obligation by pension plan administrators to select lower-cost investment options, and thus authorizes an enormous transfer of wealth from American workers to mutual fund investment advisers.

Deere offers no persuasive reasons for denying certiorari. Deere's contention that petitioners "waived" their challenge to the prudence of Deere's selection of retail Fidelity mutual funds is wholly unsupported. Petitioners included that challenge in their Second Amended Complaint ("Amended Complaint"), and they pressed it below. Moreover, the Seventh Circuit rejected petitioners' challenge on the merits, which alone defeats Deere's waiver argument.

Deere's remaining arguments also are unavailing. The Seventh Circuit's holdings under § 404(a) and § 404(c) of ERISA are at odds with other circuits' decisions and DOL's authoritative interpretation. After the certiorari petition was filed, the Eighth Circuit reversed a district court's dismissal of claims virtually indistinguishable from those pressed by petitioners below. Deere barely references that Eighth Circuit decision and ignores its import. Instead, Deere seeks to defend the Seventh Circuit's holdings below on the merits without persuasively addressing the conflicts that now exist on both questions presented.

The circuit conflict created by the decision below generates massive uncertainty for American pension plan participants and their employers. Whether a participant can state a claim for a breach of fiduciary duty under ERISA for a company's inclusion of retail mutual funds in 401(k) plans now rests entirely on the fortuity of where employees work and where their companies are based. Each year, plan administrators invest pension plan assets in high-cost retail mutual funds that drain American workers' retirement assets of hundreds of millions of dollars in unnecessary and excessive fees. Given those enormous costs, the Court should review the important and recurring issues raised by the petition.

I. PETITIONERS HAVE NOT WAIVED THEIR CHALLENGE TO DEERE'S IMPRUDENT SELECTION OF RETAIL MUTUAL FUNDS WITH EXCESSIVE FEES

Deere contends that petitioners "waived" any challenge to its imprudent selection of retail mutual funds with unnecessarily high fees because petitioners "limited their prudence challenge" to Fidelity's revenue-sharing arrangement until their petition for rehearing in the Seventh Circuit. Opp. 12, 17-18. The record does not support those contentions.

Petitioners' Amended Complaint alleged that Deere's failure to minimize the costs of investment options constituted a breach of Deere's fiduciary obligations under ERISA. That allegation encompassed petitioners' claim that Deere's selection of retail Fidelity mutual funds (and their attendant high fees) was inappropriate given the availability of alternative investment vehicles with significantly lower fees. *See* Am. Compl. ¶¶ 36, 44, 76, 105(a), (b), (c), (f), (j); *see also* DOL Rehearing Br. 3 (noting that Deere's

selection of excessive, retail-level fees was at the heart of the Amended Complaint).

The district court squarely addressed petitioners' excessive-fees claim. As that court recognized, in addition to the challenge to the revenue-sharing arrangement, "[t]he second amended complaint also allege[d] that defendants breached their fiduciary obligations by selecting and offering investment options with unreasonably high fees for the 401(k) plans." Pet. App. 42a. Specifically, "[petitioners] allege[d] that defendants breached their fiduciary duties . . . by failing to properly evaluate the expense ratios applicable to the plan investment options and provide less expensive options so participants paid greater expenses than necessary, resulting in investment losses." *Id.* at 46a. The court dismissed petitioners' claim on the ground that the § 404(c) safe harbor barred liability. *See id.* at 46a-47a.

On appeal, petitioners again contended that Deere's selection of high-cost retail mutual funds was imprudent. The Seventh Circuit likewise addressed that as a separate claim distinct from the failure to disclose Fidelity's revenue-sharing arrangement. *See id.* at 16a ("distill[ing]" the Amended Complaint into two assertions: (1) Deere failed to disclose the revenue-sharing agreement and (2) "Deere imprudently agreed to limit the investment options to Fidelity Research funds and therefore offered only investment options with excessively high fees"); *see also id.* at 19a (addressing "plaintiffs' contention that Deere violated its fiduciary duty by selecting investment options with excessive fees"). The Seventh Circuit upheld the district court's dismissal, ruling that petitioners' allegations failed to state a claim under § 404(a)

and, alternatively, that defendants were immune from liability under § 404(c)'s safe harbor.

In its supplemental order denying rehearing, the Seventh Circuit reaffirmed its rejection of petitioners' challenge to Deere's selection of high-cost retail mutual funds:

> [Plaintiffs] *argued* . . . that the Plans were flawed because Deere decided to accept "retail" fees and did not negotiate presumptively lower "wholesale" fees. The opinion discusses a number of reasons why that particular assertion is not enough, in the context of these Plans, to state a claim, and we adhere to that discussion.

Id. at 53a (emphasis added).

In sum, petitioners challenged Deere's selection of unnecessarily costly investment options throughout the proceedings below. Moreover, the Seventh Circuit decided the issue, which alone makes it appropriate for this Court's review. *See, e.g., United States v. Williams*, 504 U.S. 36, 41 (1992) (Court may review an issue not pressed so long as it has been passed upon by the court below). Deere's waiver argument, therefore, is baseless.

II. THE SEVENTH CIRCUIT'S IMPROPERLY NARROW INTERPRETATION OF § 404(a) WARRANTS THIS COURT'S REVIEW

In its opposition, Deere nowhere even mentions that the Eighth Circuit recently reversed a district court's dismissal under Rule 12(b)(6) of claims virtually indistinguishable from those in petitioners' Amended Complaint, in clear conflict with the decision below. Deere's emphasis on the merits provides no basis for denying certiorari to resolve the conflict that exists.

A. The Eighth Circuit's Recent Decision In *Braden v. Wal-Mart* Directly Conflicts With The Decision Below

The decision below cannot be squared with long-standing circuit precedents holding that a fiduciary's decision should be judged based not only on its results but also on "whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment." Pet. 24 (internal quotations omitted). Since the filing of the petition, the Eighth Circuit has rejected the contrary approach taken by the Seventh Circuit below.

In *Braden v. Wal-Mart Stores, Inc.*, No. 08-3798, 2009 WL 4062105 (Nov. 25, 2009), the Eighth Circuit held that allegations of imprudent investment selection nearly identical to those in this case were sufficient to state a claim under § 404(a). Like petitioners, the plaintiff (Braden) alleged that Wal-Mart, given its large pension plan, breached its fiduciary duty to plan participants by "offer[ing] only retail class shares, which charge significantly higher fees than institutional shares for the same return on investment." *Id.* at *7; *see also id.* at *1-*2 (describing plaintiff's challenge to the selection of retail mutual funds). The Secretary of Labor filed an *amicus* brief supporting the plaintiff, as she did in this case, on the ground that a plan administrator's failure to "conduct[] an adequate investigation of available fund options, fees and performance," and "to use the [Plan's] considerable bargaining power . . . to negotiate better fees for the Plan," constituted a breach of fiduciary duty under § 404(a). DOL *Braden* Br. 4. Wal-Mart, citing *Hecker*, argued that those allegations failed to state a claim for fiduciary breach because the selected retail mutual funds' expense ratios

were "'set against the backdrop of market competition.'" Appellees *Braden* Br. 22-25 (Apr. 7, 2009) (quoting *Hecker*).

In direct conflict with the Seventh Circuit, the Eighth Circuit agreed with the plaintiff and the DOL, holding that the allegations of the *Braden* complaint, if proved, would state a claim for fiduciary breach. *See* 2009 WL 4062105, at *8. The decision below squarely conflicts with the Eighth Circuit's decision in *Braden*, as even the employer in that case (Wal-Mart) recognizes.[1] Deere's brief in opposition hardly mentions *Braden*,[2] and all it can muster is a weak attempt at distinguishing *Braden* on the ground that Wal-Mart offered a relatively small number of high-cost retail mutual funds, whereas Deere here offered numerous high-cost mutual fund options to plan participants. *See* Opp. 16. But the number of available retail funds cannot be dispositive given that petitioners and the *Braden* plaintiff challenged the plan administrator's failure to consider alternative investment vehicles that have systematically lower expense ratios than retail mutual funds. The

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[1] In its rehearing *en banc* petition in *Braden*, Wal-Mart states that "[t]he Panel's ruling . . . directly conflicts with the Seventh Circuit's decision in *Hecker*." Appellees *Braden* Reh'g Pet. 11 (Dec. 9, 2009); *see also id.* at 12 ("[n]or is *Hecker* distinguishable").

[2] Deere cites *Braden* for the proposition that a "'bare allegation that cheaper alternative investments exist in the marketplace'" is insufficient to plead a breach of fiduciary duty under § 404(a), 2009 WL 4062105, at *8 n.7 (quoting *Hecker*), but petitioners' Amended Complaint rested on no such "bare allegation," *see* Pet. 26 n.8. Rather, as in *Braden*, petitioners allege that Deere failed to conduct an adequate investigation into lower-cost options and chose retail mutual funds because they paid costs that Deere otherwise would have borne. Pet. 26-27.

holding in *Braden* – that a plan administrator's failure to compare the cost of retail funds versus cheaper alternatives states a claim for imprudence under § 404(a) – conflicts with *Hecker*. This Court should review the decision below because it creates a circuit conflict on the scope of a plan administrator's fiduciary duty to investigate lower-cost available investment options. *See also In re Honda of Am. Mfg., Inc. ERISA Fees Litig.*, No. 2:08-cv-1059, 2009 WL 3270490 (S.D. Ohio Oct. 9, 2009) (dismissing complaint challenging inclusion of retail mutual funds based on *Hecker* and the now-overruled district court decision in *Braden*).

B. Deere's Remaining Arguments Confirm The Need For This Court's Review

Deere's remaining arguments on the merits highlight the need for this Court's review. Deere notes (at 18) that 91% of 401(k) plans offer retail mutual funds and 55% of all 401(k) plan assets (more than $1.7 trillion) are invested in such funds. Those statistics underscore the critical importance of the questions presented to American workers. The additional fees associated with high-cost retail mutual funds diminish American pension plan assets by more than a billion dollars annually. *See* Pet. 30; AARP *et al.* Br. 8-10. Given those economic stakes, this Court's review is urgently needed.

Deere, moreover, defends the decision below on the ground that ERISA incorporates industry norms into the fiduciary standards under § 404(a), such that the selection of high-cost retail mutual funds is, as a matter of law, consistent with plan administrators'

fiduciary duties.[3] Not only does that argument have no basis in ERISA, but, apart from unspecified "reasons for this" industry practice (Opp. 19), Deere offers no justification for the additional costs of selecting higher-priced retail mutual funds. Petitioners allege that Deere selected Fidelity's retail mutual funds because it failed to conduct an adequate investigation and because it sought to benefit itself at the expense of the plans' participants. Dismissal of those allegations at the pleading stage without any opportunity for factual development on the basis of an unexplained industry practice creates an enormous loophole in ERISA's fiduciary protections for American pension plan participants that warrants this Court's review.[4]

Finally, invoking the "hypothetical prudent fiduciary" doctrine, Deere argues that "the court of appeals correctly concluded that petitioners were not injured because they could choose from a variety of investment options with varying costs." Opp. 22-23. But that argument simply begs the question presented: whether Deere's selection of retail mutual funds was objectively reasonable given the availa-

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[3] Deere seeks to deflect attention from its own breach of fiduciary duty by mischaracterizing (at 36) petitioners' argument as advocating a *per se* rule "outlaw[ing]" inclusion of retail mutual funds under any circumstances. Petitioners have never made any such argument. But plan administrators, such as Deere, should not receive blanket immunity from liability under § 404(a) of ERISA simply because they *include* a wide range of retail mutual funds. Each case should be judged on its own facts.

[4] Deere suggests (at 17) that plan participants received various investment management services in exchange for the higher fees. As Deere acknowledges (at 19), however, the record contains no evidence of any such services, and thus provides no justification for dismissing petitioners' claims.

bility of other, lower-cost options. *See Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 919 (8th Cir. 1994) (stating that the "hypothetical prudent fiduciary" doctrine asks whether the fiduciary's decisions were objectively reasonable). The Eighth Circuit in *Braden* concluded that the substantive allegations at issue here stated a claim for fiduciary breach. The conflict between the Seventh and Eighth Circuits warrants this Court's review given the importance of the question to American workers.

III. THE SEVENTH CIRCUIT'S INTERPRETATION OF § 404(c) MERITS REVIEW

A. The Conflict With The Fourth Circuit Is Significant

The Seventh Circuit's holding that the Secretary's interpretation of § 404(c) in the preamble to her regulations was not entitled to *Chevron* deference cannot be squared with the contrary conclusion of the Fourth Circuit in *DiFelice*. *See* 497 F.3d at 418 n.3; Pet. 15-18. The decision below thus deepened a pre-existing division between the Fourth and Fifth Circuits regarding the legal force of the Secretary's preamble and the proper interpretation of § 404(c).

Deere suggests (at 29) that the circuit split is "illusory" because the Fourth Circuit's discussion of § 404(c) in *DiFelice* was technically dictum. As explained in the petition (at 16-17), however, many district courts have agreed with *DiFelice* and the dissent in *Langbecker* that the Secretary's preamble merits deference. By contrast, the Seventh Circuit expressly rejected *DiFelice*, *see* Pet. 11-12, as have all district court decisions within that circuit since *Hecker*, *see* Pet. 17-18. As this Court has long recognized, influential dicta can have far-reaching consequences and often are appropriate for review. *See*,

e.g., *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 536 (1994) (granting certiorari to review "dicta" that had been the source of disagreement among numerous lower courts). Given the pervasive division among the lower courts on an important question concerning the Secretary of Labor's regulatory scheme, this Court's review is warranted.

Deere also argues (at 30) that the Seventh Circuit's ruling under § 404(c) does not justify certiorari because it was an "alternative" holding. However, the only other basis for the Seventh Circuit's decision – namely, its narrow interpretation of § 404(a) – also warrants review because it, too, conflicts with the law of other circuits and the position of the DOL. The Court should grant certiorari to review both of the Seventh Circuit's alternative holdings.

B. Deere's Merits Arguments Confirm The Need For This Court's Review

Deere's brief does not defend the Seventh Circuit's rationale that the Secretary's regulatory preamble does not deserve deference because it was not codified "in the regulation proper." Pet. App. 50a. That implicit confession of error is dictated by this Court's decisions, which require courts to defer to administrative interpretations that reflect the agency's "fair and considered judgment" on the matter. *See*, *e.g.*, *Auer v. Robbins*, 519 U.S. 452, 462 (1997); *see also* Pet. 20-22. Here, the interpretation in question went through full notice-and-comment rulemaking and thus far exceeded that standard. *See* Pet. 18-20.

Deere now contends that, under *Chevron* and *Auer*, the Secretary's interpretation exceeds her regulatory authority under § 404(c), which Deere says (at 32-33) is confined to interpreting when a plan participant has control "over the assets in his account." First,

§ 505 of ERISA gives the Secretary authority to "prescribe such regulations as [s]he finds necessary or appropriate to carry out the provisions of this subchapter." 29 U.S.C. § 1135; *see Massachusetts v. Morash*, 490 U.S. 107, 117-18 (1989). The Secretary's interpretation clearly falls within that plenary authority.

Moreover, § 404(c) is ambiguous because it does not define when a loss "results from [a] participant's or beneficiary's exercise of control [over the assets in his account]." As Deere itself acknowledges (at 32), plan participants do not exercise control over investment selection. Accordingly, the Secretary reasonably construes the safe harbor not to apply when losses result from the plan fiduciary's imprudent selection of the plan's menu of investment options. If the Court does not grant certiorari to resolve the lower courts' disagreement, it should at least request the Solicitor General's views on how the Seventh Circuit's judgment affects the Secretary's regulatory regime.

IV. THE QUESTIONS PRESENTED INVOLVE CRITICAL ISSUES FOR EMPLOYEE RETIREMENT PLANS

As Deere acknowledges, the widespread practice of investing plan assets in high-cost retail mutual funds has enormous economic implications for American workers and companies. Unsurprisingly, extensive litigation is being waged in the lower courts over excessive fees. *See* Opp. 13-14. The decision below has become a focal point of that litigation. While Deere argues that *Hecker*'s holding was limited to the Amended Complaint, defendants have urged courts to read *Hecker* for the broad proposition that defendants can never be held liable for excessive fees as

long as they offer a "wide range of investments and expense ratios . . . to participants." Defendants-Appellees Br. 25-26, *Taylor v. United Techs. Corp.*, No. 09-1343-cv (2d Cir. filed July 27, 2009); *see also Loomis v. Exelon Corp.*, No. 06-cv-4900, 2009 WL 4667092 (N.D. Ill. Dec. 9, 2009) (holding that, under *Hecker*, plans offering a sufficient mix of investment options do not breach *any* fiduciary duty); *Honda*, *supra* (dismissing challenge to inclusion of retail funds based on *Hecker*). Indeed, defendants have called *Hecker*'s holding a "fundamental shift" in ERISA jurisprudence. Mem. in Support of Defs.' Mot. for J. on the Pleadings 2, *Martin v. Caterpillar, Inc.*, No. 07-1009 JBM/JAG (C.D. Ill. filed Feb. 19, 2009). Because of that "shift," employers in the Seventh and Eighth Circuits are now subject to different fiduciary obligations. Given the prevalence of excessive-fee litigation, the divisions in the lower courts will only deepen and prompt needless litigation until this Court reviews these issues.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JEROME J. SCHLICHTER
DANIEL V. CONLISK
SCHLICHTER, BOGARD & DENTON
100 South Fourth Street
Suite 900
St. Louis, Missouri 63102
(314) 621-6115

DAVID C. FREDERICK
Counsel of Record
DEREK T. HO
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

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IN THE
Supreme Court of the United States

DENNIS HECKER, JONNA DUANE,
AND JANICE RIGGINS
Petitioners,

v.

DEERE & COMPANY, FIDELITY MANAGEMENT
TRUST COMPANY, AND FIDELITY
MANAGEMENT
AND RESEARCH COMPANY,
Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For The Seventh Circuit

BRIEF OF AARP, CONSUMER FEDERATION OF AMERICA, FUND DEMOCRACY, NATIONAL SENIOR CITIZENS LAW CENTER, AND PENSION RIGHTS CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

JAY E. SUSHELSKY
COUNSEL OF RECORD
AARP FOUNDATION LITIGATION

MELVIN R. RADOWITZ
AARP

601 E Street, NW
Washington, DC 20049
Telephone: (202) 434-2060

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STATEMENT OF INTEREST[1]

AARP is a nonpartisan, nonprofit membership organization of nearly 40 million persons age 50 and older. Its mission is to help people 50+ achieve independence, choice and control in ways that are beneficial and affordable to them and society Through education, advocacy, and service, and by promoting independence, dignity, and purpose, AARP seeks to enhance the quality of life for all. In its efforts to foster the economic security of individuals as they age, AARP seeks to increase the availability, security, equity, and adequacy of public and private pension programs and the protections available to investors who accumulate savings outside of formal retirement plans.

Consumer Federation of America (CFA) is a nonprofit association of 300 consumer groups, which in turn represent more than 50 million individuals. CFA advances the consumer interest through research, education, and advocacy. As increasing numbers of people have come to rely on the nation's financial markets to fund their retirement and invest their savings, CFA has made enhancing investor protection a top legislative and regulatory priority. CFA's policies in this area are based on a fundamental belief

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[1] The parties have consented to the filing of this brief *Amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief No person other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief

that investors are entitled to a marketplace that provides them with a choice of appropriate investments and service providers, the information necessary to make informed choices, protection against fraud and abuse, and effective remedies when they are defrauded.

Fund Democracy is a nonprofit organization based in Oxford, Mississippi, that advocates on behalf of mutual fund investors. Over the last decade, Fund Democracy has submitted dozens of comment letters on agency proposals, participated frequently in amicus briefs, testified on numerous occasions before Congress on financial services issues, and written dozens of articles on investor issues in the financial press.

The National Senior Citizens Law Center ("NSCLC") is a nonprofit organization that advocates nationwide to promote the independence and well-being of low-income older persons and people with disabilities. For more than 35 years, NSCLC has served these populations through litigation, administrative advocacy, legislative advocacy, and assistance to attorneys and paralegals in legal aid programs. ERISA is a critical safeguard for the economic security and well-being of older Americans, and has played an important role in reducing elderly poverty. NSCLC believes that holding ERISA-governed plans to a high standard of prudent management is necessary to fulfill ERISA's role of keeping Americans out of poverty in their later years.

The Pension Rights Center is a Washington, D.C. nonprofit, nonpartisan consumer organization, which has as its mission the protection and promotion

of retirement security for workers, retirees and their families. For the past 33 years, the Center has provided legal representation, and other assistance and information to hundreds of thousands of participants and beneficiaries and represented their interests before administrative agencies and Congress As more and more Americans participate in a "do-it-yourself" retirement system, it is critical that participants and beneficiaries not only receive accurate and complete information about their benefits and related fees, but that they can be confident that their retirement income plans are being prudently managed.

As part of their advocacy efforts to protect investors and preserve the legal means for redress when they are harmed in the marketplace, *amici* have participated as *amici curiae* in numerous cases involving investor protections, including the scope of a fiduciary's duties as well as legislative and regulatory protections against fraudulent and deceptive conduct. One or more of *amici*, independently or with others have filed a*micus curiae* briefs in cases involving the construction and application of federal securities laws. *See, e.g., Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 128 S. Ct. 761 (2008) (AARP & CFA); *Merrill Lynch, Pierce, Fenner & Smith v. Dabit*, 547 U.S. 71 (2006) (AARP); *Dura Pharms., Inc v. Broudo*, 544 U.S. 336 (2005) (AARP & CFA); *SEC v. Edwards*, 540 U S. 389 (2004) (AARP); *SEC v Zandford*, 535 U.S. 813 (2002) (AARP & CFA). AARP and others of the *amici* also have filed briefs in numerous cases involving the duties of ERISA fiduciaries in the administration of pensions and other retirement plans. *See, e.g., LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 128 S. Ct. 1020 (2008); *Varity Corp. v. Howe*, 516 U.S. 489 (1996).

Given the primacy of 401(k) plans in the American workplace landscape, *see* AT&T *Corp.* v. *Hulteen* 129 S. Ct 1962 (2009); *LaRue v. DeWolff, Boberg, & Assocs., Inc.*, 128 S.Ct. 1020, 1025 (2008), it is imperative that participants have meaningful recourse under ERISA to protect their retirement savings and that fiduciaries of ERISA-governed private benefit plans be held to a high standard of duty to manage plans prudently. The resolution of the issues herein will have a direct and vital bearing on individuals' ability to obtain those benefits which will foster their economic security. *Amici*, therefore, submit their brief *amici curiae* to facilitate a full consideration by this Court of these issues.

SUMMARY OF ARGUMENT

The Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U S.C. § 1001, *et seq.*, was enacted to protect the interests of employees in private retirement benefit programs. With the increasing reliance on 401(k) plans and the new order of retirement financial self-reliance now promulgated in corporate culture, the protections provided by ERISA are more important than ever to the retirement security of millions of Americans. Significantly, the decision by the Seventh Circuit dilutes fiduciary obligations long-established under ERISA. First, the opinion fails to acknowledge that the fiduciary duty to prudently select investment options offered to plan participants must take into account the character of the plan, in this case a multi-billion dollar 401(k) plan with significant market power. Second, the Seventh Circuit improperly concluded that the selection of imprudent investment options by a fiduciary can be sheltered by the safe harbor of section 404(c), 29 U.S.C. § 1104(c) of ERISA.

By permitting Deere & Company ("Deere") to neglect exercising its market power when it provided only expensive "retail funds" that are typically reserved for small investors, and by failing to recognize that a fiduciary's selection of investment options both constrains the choices available to employees and provides the seal of approval from a supposedly trusted plan steward, the Seventh Circuit undermines the protections guaranteed by ERISA. Consequently, the Court has improperly put the retirement security of millions of Americans at risk by

transferring the hazards of the fiduciary's failure to select prudent investment options from its own shoulders to those of the plan participants.

ARGUMENT

A. 401(k) Plans Now Comprise The Primary Source Of Private Retirement Income Programs.

Private retirement pension benefit programs were established to provide a stable source of income to employees and their families upon retirement. However, since ERISA's passage, there has been a marked shift from defined benefit plans to defined contribution plans. Defined contribution plans have so eclipsed defined benefit plans that by 2005, approximately 55 million participants were covered by defined contribution plans, while only 21 million were covered by defined benefit plans. *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 128 S. Ct. 1020 (2008); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-530T, PRIVATE PENSIONS: INCREASED RELIANCE ON 401(K) PLANS CALLS FOR BETTER INFORMATION ON FEES 5 (March, 2007), *available at* http://www.gao gov/new. items/d07530t pdf. Of the various types of defined contribution plans available, 401(k) plans have become the most popular.[2] Dr. Allen Michel & Dr. Israel

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[2] As of 2005, there were approximately "436,000 401(k) plans that held about $2 4 trillion in assets for the retirement savings of more than 54 million plan participants—more than any other type of employer-sponsored pension plan in the United States " U S GOV'T ACCOUNTABILITY OFFICE, GAO-08-774, PRIVATE PENSIONS FULFILLING FIDUCIARY OBLIGATIONS CAN PRESENT CHALLENGES

Shaked, *Fiduciary Responsibility in the Case of Defined Contribution Plans*, 23 AM. BANKR. INST J. 46, 46 (2005).

The shift to defined contribution plans has caused a fundamental risk reallocation in retirement planning because the retirement security for most Americans now depends on the returns achieved by investment options made available through their 401(k) plans. Unlike a defined benefit plan, which generally is funded solely by the employer and is required to provide a life-time annuity as a distribution option, a defined contribution plan provides no guaranteed benefit because the amount received is dependent upon the level of employee and employer contributions and whether those investments experience growth or suffer losses during the life of the account. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-8, PRIVATE PENSIONS: LOW DEFINED CONTRIBUTION PLAN SAVINGS MAY POSE CHALLENGES TO RETIREMENT SECURITY, ESPECIALLY FOR MANY LOW-INCOME WORKERS 4 (2007). *available at* http://www.gao.gov/new.items/d088.pdf. Accordingly, employees bear a far greater responsibility for the ultimate funding of their retirement income than previously. STRENGTHENING WORKER RETIREMENT SECURITY BEFORE THE H. COMM. ON EDUC. AND LAB., 111th Cong. 5 (2009) *available at* http://edlabor.house.gov/documents/111/pdf/testimony/20090224JohnBogleTestimony pdf (statement of John C. Bogle, Founder and Former Chief Executive of the Vanguard Group) (describing this transition to defined contribution plans as "a massive transfer from

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FOR 401(K) PLAN SPONSORS 1 (July 2008), *available at* http://www gao gov/new items/d08774.pdf

business enterprises to their employees of both investment risk (and return) and the longevity risk of retirement funding").

Moreover, for the vast majority of individuals now saving for retirement through 401(k) plans, the amount contributed and accumulated is critically important, as it is often their only source of private retirement income. "[M]ore than 60 percent of workers with pension coverage in 2003 had *only* a 401(k) plan or other defined contribution plan." AARP, *401(k) Participants' Awareness and Understanding of Fees* 2 (July 2007), *available at* http://assets.aarp.org/rgcenter /econ/ 401k_fees.pdf. The primacy of such plans to fund retirement makes it vital that 401(k) retirement plan participants be protected.

B. The Impact of Fees on Retirement Savings Plan Accumulations is Significant.

Because of the effect of compounding interest, offering investment options that under-perform other available options, even by seemingly small margins, significantly reduces the long-term retirement savings of 401(k) plan participants. Investment fees and expenses charged by investment managers are generally paid by participants out of plan assets. U S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-21, PRIVATE PENSIONS: CHANGES NEEDED TO PROVIDE 401(K) PLAN PARTICIPANTS AND THE DEPARTMENT OF LABOR BETTER INFORMATION ON FEES 10 (2006), *available at* http:// www.gao.gov/new.items/d0721.pdf. These payments ultimately decrease the return on investment because the fees "are paid with funds that could otherwise be earning and compounding on a tax-deferred basis."

ARE HIDDEN 401(K) FEES UNDERMINING RETIREMENT SECURITY?: HEARING BEFORE THE H. COMM. ON EDUCATION & LABOR, 110th Cong. (2007) *available at* http://edlabor.house.gov/testimony/030607StephenButlertestimony.pdf (testimony of Stephen J. Butler, President of Pension Dynamics Corporation, Author and Weekly Financial Columnist on "Undermining Worker's Retirement Security"). This reduction in principal [or returns] can be critical, especially considering the low account balances of many 401(k) plans, 3 and "can significantly decrease retirement savings over the course of a career." GAO REPORT: INCREASED RELIANCE ON 401(K) PLANS, *supra*, at 10. This impact is demonstrated in a report by the Employee Benefits Security Administration:

> Assume that you are an employee with 35 years until retirement and a current 401(k) account balance of $25,000. If returns on investments in your account over the next 35 years average 7 percent and fees and expenses reduce your average returns by 0.5 percent, your account balance will grow to $227,000 at retirement, even if there are no further contributions to your account. If fees and expenses are 1.5 percent, however, your account balance will grow to only $163,000. The 1 percent difference in

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[3] In 2005, 84 percent of 401(k) account balances were less than $100,000 and 37 percent of participants had balances less than $10,000 GAO REPORT INCREASED RELIANCE ON 401(K) PLANS, *supra*, at 9-10

> fees and expenses would reduce your account balance at retirement by 28 percent.

EMPLOYEE BENEFITS SECURITY ADMINISTRATION, U.S. DEP'T OF LABOR, A LOOK AT 401(K) PLAN FEES, 2, *available at* http://www dol.gov/ebsa/pdf/401kFees Employee.pdf. Consequently, imprudent investment options offering even a small reduction in current investment performance can "seriously undermine the odds in favor of success for citizens who are accumulating savings for retirement." Bogle, *supra*, at 3

C. The Circuit Court's Holding Undermines The Statutory Language And Purpose Of ERISA By Failing To Acknowledge That Plan Managers Have A Fiduciary Duty To Prudently Select Plan Investment Options, Which Includes A Duty To Investigate Investment Vehicles In Light Of All Available Options.

The Seventh Circuit strayed from precedent established in other circuits by failing to recognize that ERISA's fiduciary duties include the duty to prudently select investment options made available to 401(k) plan participants. In order to protect the interests of employees and their beneficiaries in retirement plans, ERISA imposes the duties of loyalty and prudence on plan fiduciaries by establishing standards of conduct attaching to the fiduciaries' exercise of duties related to "the proper management, administration, and investment of plan assets," *Mertens v. Hewitt Assocs* , 508 U.S. 248, 251 (1993) (citation omitted).

Specifically, circuit courts have recognized that these duties apply to the selection of investment options made available to plan participants. *See, e.g., DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 (4th Cir. 2007) ("[A] fiduciary of a defined contribution, participant-driven, 401(k) plan created to provide retirement income for employees who is given discretion to select and maintain specific investment options for participants, must exercise prudence in selecting and retaining available investment options").4 Thus, plan sponsors cannot, without violating ERISA, set plan participants up to fail by presenting them with imprudent investment options.

In concluding that "no rational trier of fact could find . . . that Deere failed to satisfy that duty," the Seventh Circuit improperly minimized the scope of the applicable fiduciary duty by merely relying on the district court's determination that "there was a wide

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4 *See also, Fink v Nat'l Sav. and Trust Co.*, 772 F.2d 951, 957 (D C. Cir 1985) ("A fiduciary's independent investigation of the merits of a particular investment is at the heart of the prudent person standard"), *In re Unisys Sav Plan Litig.*, 74 F 3d 420, 435 (3d Cir 1996) ("[T]he most basic of ERISA's investment fiduciary duties, [is] the duty to conduct an independent investigation into the merits of the particular investment") The Department of Labor has similarly interpreted the fiduciary duties to apply to investment options made available through defined contribution plans. 57 Fed Reg 46906, 46924 n 27 (Oct 13, 1992) ("The [DOL] points out that the act of limiting or designating investment options which are intended to constitute all or part of the investment universe of an ERISA 404(c) plan is a fiduciary function"); *see also* Steven J Sacher, *et al*, EMPLOYEE BENEFITS LAW 696 (2d ed. 2000) ("[P]lan fiduciaries of Section 404(c) plans have a fiduciary obligation to make prudent selections of investment options")

range of expense ratios among the twenty Fidelity mutual funds and the 2,500 other funds available through BrokerageLink." *Id.* In so concluding, the court failed to address the prudence of considering retail mutual funds to the exclusion of other investment vehicles. It is not the quantity of options that constituted a breach of the fiduciary duty, but rather the failure to evaluate whether offering the array of retail funds or any single retail fund was prudent in light of the availability of institutional trust accounts that would have generated substantially higher investment returns by providing similar or better market performance at lower cost. *See* Sari M Alamuddin & Shannon M Callahan, *The Next ERISA Battleground: Mutual Fund Fees and Expenses*, BENEFITS LAW JOURNAL, Winter 2006 at 60 (noting that ERISA's prudential duty requires that "[w]here courts find a mutual fund is more expensive than its counterparts, the plan fiduciaries will likely have to show that the more expensive fund provided better returns, more services, or a different investment objective than a less expensive fund").

It is imprudent for the managers of a multi-billion dollar 401(k) plan to offer as investment options only "retail" mutual funds that are typically reserved for individuals or small investors and are not intended for use by large plans. ERISA requires that a fiduciary select investment options "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man *acting in a like capacity* and familiar with such matters would use in the conduct of an *enterprise of a like character* and with like aims." 29 U.S.C. § 1104(a)(1)(B) (emphasis added) In this context, the "character" of the Deere

enterprise is a multi-billion dollar 401 (k) plan that possesses substantial market power. *Hecker v. Deere & Co.*, 556 F.3d 575 (7th Cir. 2009). Managers of such plans have the market power to offer institutional mutual funds and trust accounts that provide market performance similar to retail mutual funds at substantially lower cost. *See* DEPT. OF LABOR, PENSION WELFARE BEN. ADMIN., STUDY OF 401(K) PLAN FEES & EXPENSES (Apr. 13, 1998) § 2.4.1.3, *available* at http://www.dol.gov/ebsa/ pdf/401krept.pdf ("Very large plans [with assets over $500 million] can achieve even greater investment management savings by establishing separate accounts for their 401(k) assets, . . . [where] [t]otal investment management expenses can commonly be reduced to one-fourth of the expenses incurred through retail mutual funds"). Because Deere plan fiduciaries, unlike individual mutual fund investors, have the market power to negotiate at arms length with investment companies to provide institutional accounts offering higher net returns on investment, the failure to do so would be the failure to act with the "care, skill, prudence, and diligence" of "a prudent man acting in a like capacity" and would therefore constitute a breach of ERISA's fiduciary duty. 29 U.S.C. § 104(a)(1)(B).

D. Section 404(C) Of ERISA Does Not Immunize A Fiduciary From Liability For Selecting Imprudent Investment Options.

The circuit court ignored the plain language of the statute, the Department of Labor regulations, and case law when it misconstrued the language of section 404(c) of ERISA by finding that merely because a plan participant has control over the investments in his

plan account, a plan fiduciary bears no responsibility for the selection of investment options. Section 404(c) of ERISA, provides that "no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, *which results from* such participant's or beneficiary's exercise of control." 29 U.S.C. § 1104(c)(1)(A)(ii) (emphasis added). However, before a selection of an investment option can properly be attributed to the decision of a plan participant, a court must first consider whether the plan improperly limited the scope of participant choice by selecting imprudent investment options.

Here, the court expands the 404(c) safe harbor for fiduciaries by giving the fiduciary a pass if it offers "numerous investment options." Under the court's rationale, if a fiduciary were to offer 20 investment options, with 19 of them the worst performing options in a year, there would be no liability because there were "numerous investment options" offered to participants. Participants would have exercised control even if they did not figure out which one investment option was not underperforming. However, case law already provides that "a fiduciary cannot free himself from his duty to act as a prudent man simply by arguing that other funds, which individuals may or may not elect to combine with a company stock fund, could theoretically, in combination, create a prudent portfolio." *DiFelice v. U.S. Airways Inc.*, 497 F.3d 410, 422-24 (4th Cir. 2007) ERISA section 404(c) does not condone an evasion of fiduciary responsibility in such a manner.

Moreover, the court failed to accord proper weight to the Department of Labor's interpretation of the regulation for section 404(c), which in its preamble

states that:

> The Department emphasizes, however, that the act of designating investment alternatives (including look-through investment vehicles and investment managers) in an ERISA section 404(c) plan is a fiduciary function to which the limitation on liability provided by section 404(c) is not applicable. All of the fiduciary provisions of ERISA remain applicable to both the initial designation of investment alternatives and investment managers and the ongoing determination that such alternatives and managers remain suitable and prudent investment alternatives for the plan. Therefore, the particular plan fiduciaries responsible for performing these functions must do so in accordance with ERISA.

Final Regulation Regarding Participant Directed Individual Account Plans (ERISA Section 404(c) Plans), 57 Fed. Reg. 46,906, 46,922 (Oct. 13, 1992) (to be codified at 29 C.F.R pt 2550); *see also* Amended Brief of the Secretary of Labor, Elaine L. Chao, as *Amicus Curiae* in Support of Plaintiffs-Appellants at 12, *Hecker v Deere & Co.*, Nos. 07-3605, 08-1224, 556 F.3d 575 (7th Cir. Feb. 12, 2009); *Spano v. Boeing Co* , 2007 WL 2688456, at *1 (S.D. Ill., 2007) ("The majority of courts to have interpreted ERISA § 404(c), 29 U.S.C. § 1104(c), have adopted the DOL's position" that selecting the investment options in a plan is not a

function in the exercise of which plan fiduciaries are shielded from liability by the statute) (citing cases); *but see Hecker*, 556 F.3d at 588; *Langbecker v. Elec Data Sys. Corp.*, 476 F.3d 299, 310 (5th Cir. 2007) (holding that defendants who breach their fiduciary duties are nevertheless insulated from liability as long as there exists a sufficient breadth of funds made available to participants under the plans).

E. By Diluting the Standard of Care Applicable to ERISA Fiduciaries, the Seventh Circuit's Decision Deprives Plan Participants of the Benefit of an Experienced Fiduciary Acting on Their Behalf

Conspicuously underlying the circuit court's opinion is the premise, flawed at its core, that pension plan participants should be treated the same as any investor in the marketplace. This premise is wrong because ERISA mandates that plan administrators are fiduciaries, establishing a fundamentally different relationship between the plan administrator and participant than between a mutual fund and an investor. The administrator is cast in the role of steward in relation to plan participants, who trustingly look to the plan administrator with the expectation of guidance. *See generally, e.g* , Shlomo Benartzi et al., *The Law and Economics of Company Stock in 401(k) Plans*, 50 J.L. & ECON. 45-79 (2007).

This special relationship is particularly important to the retirement security of countless Americans, who increasingly rely on 401(k) plans as their sole investment vehicles for retirement, because generally the investment market structure tolerates

an exploitive relationship between sophisticated financial advisers and naive investors. *Id.* at 14 (quoting Davis F. Swensen, Chief Investment Officer at Yale University, who stated that "'[t]he drive for profits by Wall Street and the mutual fund industry overwhelms the concept of fiduciary responsibility, leading to an all too predictable outcome: . . . the powerful financial services industry exploits vulnerable individual investors . . . .'"). Moreover, research indicates that 401(k) plan participants often are not confident of their abilities to select prudently from among the investment options available to them. For example, a survey of stock owners age 50 to 70 indicates that:

> close to three in four respondents (72-76%) have more confidence in the abilities of mutual fund managers or stock brokers to conduct transactions for them than they have in their own abilities to conduct transactions. In contrast, only one in three (33%) are confident in their ability to buy and sell individual stocks without the assistance of stock brokers.

AARP, *Investor Perceptions and Preferences Toward Selected Stock Market Conditions and Practices: An AARP Survey of Stock Owners Ages 50 and Older* (Mar. 2004), *available at* http://assets.aarp.org/rgcenter/econ/investor.pdf.

This knowledge gap between sophisticated financial advisors and ordinary plan participants emphasizes the significance of a plan fiduciary's duty

to prudently select funds. The prudence of plan administrators is evaluated in relation to that of a reasonable financial expert. Therefore, in selecting investment options to be made available to 401(k) plan participants, the function of these fiduciaries should not be merely to overwhelm plan participants with a representative sample of both the good and the bad investment options available on the open market, but rather to exercise their financial expertise, solely for the benefit of plan participants, by narrowing the field of investment options to those options with the greatest likelihood of protecting the retirement security of plan participants.

Unfortunately, the court's decision completely dilutes the standard of care applicable to ERISA fiduciaries, and flies in the face of the language of the statute and regulations. The court's decision ultimately transfers (so long as "numerous investment options" are provided) the duty of selecting prudent investments from the fiduciary to the participant by requiring the participant to weed through numerous investment options, and analyze endless, piecemealed documentation, simply to determine which funds are prudent investments—a duty that prior to *Hecker* belonged to the fiduciary. If permitted to stand, the court's decision, regrettably, invites a 401(k) fiduciary standard of conduct that would permit a plan administrator to select a fund or funds with manifestly excessive fees and it would permit no recourse to plan beneficiaries on account of such clearly inappropriately chosen investment options Indeed under the court's rationale, the ill-chosen fund(s) would have equal footing with an exemplary selection in a plan's investment menu.

CONCLUSION

The Court's grant of the petition will facilitate an interpretation of the Employee Retirement Income Security Act that will comport with the Congressional intent to protect the retirement savings and security of the nation's working people.

For the reasons stated above, *Amici* respectfully submit that the Court should grant the Petition for Writ of Certiorari for full briefing.

Respectfully submitted,

Jay E. Sushelsky
Counsel of Record
AARP FOUNDATION LITIGATION

Melvin R. Radowitz
AARP

601 E Street, NW
Washington, DC 20049
Telephone: (202) 434-2060

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Supreme Court of the United States

DENNIS HECKER, JONNA DUANE,
AND JANICE RIGGINS,

Petitioners,

v.

DEERE & COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR MATTHEW D. HUTCHESON AND ROBERT BROOKS HAMILTON AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

ROBERT BROOKS HAMILTON
Counsel of Record
5353 Keller Springs Road #1022
Dallas, Texas 75248
972-839-5260

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COCKLE LAW BRIEF PRINTING CO (800) 225-6964
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INTEREST OF *AMICI CURIAE*[1]

Matthew D. Hutcheson and Brooks Hamilton are professional independent fiduciaries, and are well known and respected advocates of retirement plan participants. As independent fiduciaries, they are appointed by employers to be the principal decision makers for ERISA plans. They are thus representative of prudent men who have firsthand practical knowledge of what it means to expertly conduct an enterprise of like character with like aims under prevailing circumstances (see 29 U.S.C. § 1004, 404(a)(1)(B)).

This brief is supported by Fiduciary360 (fi360),[2] the Centre for Fiduciary Excellence (CEFEX),[3] and the Committee for the Fiduciary Standard.[4]

Fiduciary360 (fi360) provides training, Web-based tools, and resources for investment fiduciaries. The mission of fi360 is to promote a culture of fiduciary responsibility and improve the decision

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* and their counsel made a monetary contribution to fund its preparation or submission. Counsel for Petitioners filed a letter with the Clerk granting blanket consent to the filing of *amicus* briefs, and a letter reflecting the consent of Respondent to the filing of this brief has been filed with the Clerk. The parties were notified ten days prior to the due date of this brief of the intention to file.

[2] www.fi360.com

[3] www.cefex.org

[4] www.thefiduciarystandard.org

making of those who manage money on behalf of others.

The Centre for Fiduciary Excellence, LLC is an independent certification organization. CEFEX works closely with industry experts to provide comprehensive assessment programs to improve the fiduciary practices of investment stewards, advisors, recordkeepers, service providers and managers.

The Committee for the Fiduciary Standard is a nonpartisan membership organization of over 600 investment professionals whose mission is to preserve the authentic fiduciary standard in any legislation and rulemaking.

These three organizations provide education, certification, and other services to over 5,000 fiduciary professionals who in turn serve millions of retirement plan participants.

SUMMARY OF ARGUMENT

Fiduciaries are held to a standard of knowledge and behavior applied to those familiar with such matters, otherwise known as "experts." Thus, within the 401(k) industry, the fiduciary standard is often referred to as the "prudent expert rule." When coupled with a duty of loyalty, the prudent expert standard becomes the "highest duty known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 (2d Cir. 1982).

As experts familiar with the prevailing circumstances surrounding the management of a pension benefit program defined under ERISA (29 U.S.C. § 1002, 3(2)(A)), *amici* respectfully submit to the Court that the lower courts have misinterpreted the matter now before this Court as a "mutual fund" pricing issue. The lower courts erred in that interpretation.

The matter before the Court is simple; plan fiduciaries are required to act as a prudent expert within the context of managing a $4 billion retirement plan with 17,000 participants. Participants were unnecessarily harmed because defendants failed to understand and then act upon their most fundamental, fiduciary duty.

The defendants permitted the participants to be harmed by turning a blind eye toward competitive alternatives which could have ensured that only reasonable plan costs were incurred. The defendants are held to the prudent expert standard. As prudent experts, the defendants failed to meet the required standard.

ARGUMENT

The highest standard known to the law carries with it a commensurate sensitivity to the specific needs of a given retirement plan's participants and beneficiaries. Participants and beneficiaries rely on fiduciaries with an expectation they will be protected

from unnecessary risks, costs, and harm. Participants and beneficiaries are therefore vulnerable to the actions – or inactions – of those in a position of trust, such as a named fiduciary or trustee.[5] ERISA contemplates that fiduciaries should and will exert a high degree of diligence by periodically investigating investment and service alternatives available to a plan. The larger the plan is, the greater the economic advantage a fiduciary may capture for the exclusive benefit of participants. In other words, larger plans have greater bargaining power that can be brought to bear for the participant's benefit.

Failing to understand that economic advantages were available, and then leaving those advantages un-captured due to insufficient application of care, skill, effort, etc., is fundamentally a disloyal act, and damages the retirement saving interests of participants and beneficiaries. Thus, the defendants failed to properly serve the specific purpose for which funds were entrusted to them.

Congress intended ERISA to require fiduciaries to exert careful and skillful effort on behalf of participants and beneficiaries for a reason; because participants and beneficiaries are both reliant on fiduciaries, and vulnerable to their actions. A broad

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[5] Journal of Pension Benefits; Spring 2009 401(k) Investments Column – A New Look at Fiduciary Responsibility. Pages 53-56. See also October 1, 2009 Congressional Statement by Matthew D. Hutcheson; United States House of Representatives, Committee on Ways and Means.

market "suitability" standard (a lesser, non-fiduciary standard) is not sufficient to determine reasonableness and fairness of plan costs and satisfy associated ERISA obligations.[6] If market forces alone are deemed sufficient to determine the fairness of fees and costs fiduciaries would serve no meaningful purpose in this regard. Yet, that is clearly not what Congress intended. Congress understood that participants and beneficiaries would need the protections of a diligent fiduciary. Accordingly, ERISA requires at least one named fiduciary [ERISA § 402(a)] to be appointed to control and manage administration and operation of a plan, which includes the obligation to control and account for plan expenses. The high fiduciary standard of care and the appointment of fiduciaries under ERISA are inextricably connected.

Thus, while a suitability or open market argument might be acceptable in normal day-to-day business activities, it is not sufficient for a 401(k) or other employee benefit plan subject to ERISA's strict fiduciary requirements.

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[6] FINRA, NASD Manual: Rule 2310: Recommendations to Customers (suitability), http://finra.complinet.com/finra/display/display.html?rbid=1189&element_id=1159000466 (last visited Nov. 12, 2009). Suitability, or the so-called "Know Your Client Rule," is intended to ensure practitioners broadly understand client's objectives with their money in each of their accounts; ***it is not a fiduciary standard***. See Investor Glossary, Know Your Client, http://www.investorglossary.com/know-your-client.htm (last visited Nov. 12, 2009).

> Many forms of conduct, permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. *Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928).* (Cardozo, Ch. J.).

Prudent fiduciaries are required to pursue the most reasonably efficient course available to secure retirement income for participants and beneficiaries, as contemplated under the Employee Retirement Income Security Act. Most importantly, it is incumbent upon a fiduciary to examine lower-cost alternatives to mutual funds, alternative mutual fund share classes, or even exchange traded funds and collective trust funds. Such an examination is an obviously prudent step – common to anyone who comparison shops at the local grocery store for a $4.00 item – but ignored by the defendants who were charged with a $4 billion responsibility to care for the retirement income security of 17,000 employees. The

course we would have taken is very different than the course taken by the defendants.

I. Evaluating investment alternatives critical to a prudent process.

Retail mutual funds have built in subsidies, or "gross-ups" to the fund's management fee. In other words, the fund management fee is artificially inflated to pay for something other than managing the fund. The industry calls those gross-ups or subsidies "revenue sharing." Revenue sharing may be used to pay for sales and marketing efforts, paying third party service providers, or compensating other divisions of the fund management company – such as in this instance.

Fees could easily be charged explicitly for such services, but the industry has widely endeavored to embed these subsidies in a fund's management fee to create an economic illusion that certain services cost less, or even cost nothing. However, the economic illusion, as problematic as it is to the fulfillment of fiduciary duty is only part of the problem. The greater issue is that *revenue shared is not necessarily revenue earned*, and that because of its embedded nature within a fund, the crossover point from reasonable to excessive will be murky if a fiduciary is not diligent in his or her duties – but a fiduciary is obligated not to permit that to happen unknowingly. Therefore, certain 401(k) business models and certain fund classes, when coupled together, pose a

significant challenge for fiduciaries if they are not paying attention.

II. Revenue sharing – subject to its own competitive sphere.

Because revenue sharing is unrelated to the activity of pursuing a return on investment, its very nature is extraneous. Those extraneous fees are subject to their own separate competitive forces. Those services paid for by extraneous fees are offered by a wide variety of competitors and are usually charged (or at least compared) on an hourly or per capita basis. In other words, the revenue sharing amounts are evaluated within a competitive framework that is separate from the investment or mutual fund industry. Revenue sharing is universally viewed as an entirely separate type of cost by those professionals familiar with such matters. The excess revenue (i.e. revenue generated by the fund but not earned by service providers) is frequently recaptured and credited back to participants as an industry best practice when revenue sharing cannot be avoided.

When revenue sharing is viewed in proper context, within its correct competitive realm, it is simple to assess the value of those fees and determine whether incurring their costs serves the best interests of participants.

For example, a leading provider of retirement plan services for large employers (www.milliman.com) would charge approximately $1,195,000[7] for a plan with 17,000 active participants.[8] It is estimated that defendants permitted at least $2,362,703 to be charged for the same general services.[9] If a competitive environment truly existed within this specific realm and context, a disparity of nearly 100% could not reasonably exist.[10] From first-hand knowledge of

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[7] Service fee of $70.30 per participant quoted by Genevieve B. Sedgwick, Senior Defined Contribution Consultant, Milliman, Inc.

[8] Number of employees stated on Deere & Company most recently available form 5500 filed with the Employee Benefit Security Administration as reported by www.BrightScope.com.

[9] Data by www.BrightScope.com. BrightScope renders no opinion about the meaning of the data, and bears no bias toward either party in the matter. All data interpretations and conclusions are that of the *amici*.

[10] Fund names and balances were pulled from Deere's 11-K filed with the SEC and accurate as of 10/31/2009. Share classes were assumed to be the lowest cost share class available to retail investors. In many cases this is the "Spartan" or "Advantage" share class. Fidelity has recently begun offering a "K Share" class to 401(k) investors but these shares were not available during the contemplated period. Sub-TA fees are the fees that these funds would pay to a recordkeeper through an external trust platform. Fidelity does not disclose its internal revenue sharing. Estimated Sub-TA information is only available for funds subject to the Investment Adviser Act of 1940. However some of the other funds (i.e. The Blended Interest Fund, Pyramis Commingled Pool etc.) may also pay revenue sharing. A revenue share of 10 basis points was assumed for the non-Fidelity funds on the menu. Revenue sharing is at least $2,362,703 (at least 10 basis points or .1% of plan assets, or

(Continued on following page)

amici, the excess revenue sharing fee could actually be as high as $7,848,000 annually.[11]

A prudent expert familiar with such matters will view the difference between the two fees as excessive and unreasonable, and could not overlook an unanswered concern. The precise value of services paid for by such fees should be the focus of a proper and thoughtful fiduciary analysis; an exertion of effort, proper questions, going out to bid, exploring available alternatives, etc. Suffice it to say that the large disparity reveals excess fees. Failure to exert a true fiduciary effort that leads to the incurring of unnecessary fees clearly violates the "reasonableness" standard required under ERISA. 29 U.S.C. § 1004, 404(a)(ii).

Further, there is a point at which previously reasonable fees or expenses can become unreasonable. Consider the following:

> For example, if a recordkeeper is receiving $50,000 in revenue sharing, and if a

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roughly $140 per participant per year). It is believed that an additional revenue sharing of up to .3% or 30 basis points could be charged and kept by service provider totaling .4% or 40 basis points.

[11] Experience and analysis of *amici* suggest that as much as .4% of plan assets, or $9,042,876 ($2,260,719,000 multiplied by .4%) could be extracted from participant accounts for a service that costs $1,195,000 on the open market. The .4% includes both 12(b)1 and Sub-Transfer Agent fees. $9,042,876 – $1,195,000 = $7,847,876)

> reasonable charge for its services is $50,000 – the same amount – there is no conflict. However, if the plan grows with time and the revenue sharing grows to $85,000, but a reasonable charge only increases to $60,000, the fees have become excessive. At that point, the responsible fiduciaries have three jobs: to know about the amount of the revenue sharing, to know the reasonable cost of the recordkeeper's services, and to reclaim the difference for the plan and the participants.[12]

That is an accurate description of the issue before the Court. At some point, the revenue sharing in the Deere 401(k) plan exceeded a reasonable level and the fiduciaries did nothing to identify when that moment might occur or prevent it when it did. Their failure to understand and to act breached their fiduciary duty to participants and beneficiaries.

III. Fiduciaries must appreciate their high duty.

What fiduciaries do, or do not do, affects many lives. Fiduciaries must be reminded of their high duty, and be held accountable for fulfilling that duty.

According to estimates from the Employee Benefits Research Institute, on June 30, 2009 (see

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[12] ["Revenue Sharing: What is it?" http://www.reish.com/publications/article_detail.cfm?ARTICLEID=790]

http://www.ebri.org/publications/ib/index.cfm?fa=ibDisp&content_id=4326) the median 401(k) held by someone on the verge of retirement age was $69,000. What does that number really mean? At the typical financial planners' recommended withdrawal rate of 4% a year, it means that the median retiree can count on a lifetime retirement income of Social Security plus $233 a month from his 401(k). The 401(k) is not working as well as it should, and excessive plan fees and expenses coupled with *fiduciary indifference* are two primary reasons.

The issuance of this Writ will enable the Supreme Court of the United States to give notice regarding the duty and responsibility of an ERISA fiduciary, respecting not only the initial nature and transparency of all transactions including economic costs of every nature, but also the ongoing monitoring and reasonableness of plan fees and expenses, *to act solely for the benefit of plan participants and to use the care that a prudent man acting in a like capacity and familiar with such matters would use.*

IV. The fiduciary standard must be enforced.

It is not necessary that ERISA command fiduciaries in all things; rather, fiduciaries must be actively engaged in properly discharging their duties even in the absence of specific rules or guidance. Therein lies the very reason fiduciary duty is the highest known to the law. Fulfilling fiduciary duty

requires judgment, discretion, and careful consideration.

The lower Court ruled that a *lower* standard of care or duty, if one can call it that, was adequate. We believe that the Court failed to understand that its ruling effectively nullified the need for ongoing fiduciary oversight, and eviscerates what Congress originally contemplated. In very clear and simple terms, the lower Court held that a *"so-so"* behavior with *"so-so"* results (at best) is the standard fiduciaries must meet, not the highest standard known to the law.

The true question of prudence here is not how many funds were offered on the plan's menu, nor whether or not these funds were also offered to the public, but rather whether a prudent investor *"acting in a like capacity and familiar with such matters"* would have selected the same retail mutual funds in the core funds, as well as the brokerage window, as those selected by the Deere fiduciaries.

Further, *"in a like capacity"* does not mean that the defendant fiduciaries must think like a prudent individual would think *"in the general public"* but rather they must think and act like a prudent investor controlling the design, administration, and oversight of a $4 billion investment plan menu.

CONCLUSION

As stated earlier, ERISA requires that a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and with the care, skill, prudence, and diligence under the circumstances then prevailing. That requires continuing effort and attentiveness.

If the matter before the Court is only about the competitiveness of mutual funds, and if the Court upholds the lower Courts' decision, then the fiduciary standard of care is eviscerated. In other words, if the lower Court's decision is upheld, plan decision makers will be encouraged to simply place a large number of funds before participants and then hide – *for their own benefit, not the participants'* – behind 404(c), under the presumption that none of those funds can have excessive fees because a competitive market will not permit it. The interests of participants and beneficiaries will be compromised and the integrity and trustworthiness of the 401(k) system will be undermined.

In such a world, fiduciaries would not need to review the funds for economic appropriateness given the size and objectives of the plan or the needs of participants. And in that world, fiduciaries would need to exercise no care, skill, prudence, or diligence. They could safely ignore prevailing circumstances regarding other types of financial instruments which may be more efficient than mutual funds, such as collective trust funds or exchange traded funds. And in such a

world, fiduciaries could conveniently turn a blind eye toward the bargaining power of large plans – all to the detriment of participants whose sole interests they are charged to protect.

Thus, the lower Court rulings weaken the intent of Congress to require that fiduciaries engage in periodic thoughtful, deliberate investigation of all alternatives. That requires careful and skillful evaluation of how costs impact a participant's long-term retirement income security – the core objective of ERISA.

Respectfully submitted,

ROBERT BROOKS HAMILTON
Counsel of Record
5353 Keller Springs Road
#1022
Dallas, Texas 75248
972-839-5260

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In The
Supreme Court of the United States

DENNIS HECKER, JONNA DUANE,
AND JANICE RIGGINS,

Petitioners,

v

DEERE & COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF *AMICI CURIAE* RICHARD KOPCKE AND FRANCIS VITAGLIANO IN SUPPORT OF PETITIONERS

STEPHEN M. TILLERY
Counsel of Record
KOREIN TILLERY LLC
205 N Michigan Avenue
Suite 1940
Chicago, IL 60601-4269
(312) 641-9750

November 16, 2009

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QUESTION PRESENTED

Amici will address the following question:

Whether the court below erred in holding – contrary to numerous other circuit decisions and the considered views of the DOL – that petitioners' allegations that a plan fiduciary selected retail mutual funds with excessive fees, without adequate investigation and without any effort to explore readily available, lower-cost options, failed to state a claim under § 404(a) of ERISA

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INTERESTS OF THE *AMICI CURIAE*[1]

Richard Kopcke, Ph.D., CFA, has conducted and supervised research on financial markets and institutions throughout his professional life. For thirty years he served as a research officer in the Federal Reserve Bank of Boston, retiring as the Vice President in charge of financial market research. Since leaving the Fed, he taught finance and portfolio management in business school. He also served as an adviser to foreign central banks and finance ministries. Mr. Kopcke currently is a financial consultant working for the United States Department of the Treasury and for the Center for Retirement Research at Boston College.

Francis Vitagliano, has been an ERISA compliance officer for over thirty years. He served as an Assistant Vice President of Merrill Lynch, 401(k) division, in charge of ERISA Compliance. Following Merrill Lynch, Mr. Vitagliano served as a Vice President at State Street Bank and Trust Company becoming head of the bank's Fiduciary Control Committee, focused on ERISA fiduciary issues. For the

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file The parties have consented to the filing of this brief

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief No person other than *amici curiae*, or its counsel, made a monetary contribution to its preparation or submission

last five years Mr. Vitagliano has been a Visiting Scholar at the Center for Retirement Research at Boston College.

Amici support the petition for a writ of certiorari in this case because it presents an important question concerning the definition of the appropriate competitive background for evaluating the investment alternatives that sponsors select for the participants in their 401(k) plans. This definition sets critical standards for sponsors' fiduciary obligations and significantly affects employees' cost of funding their retirement.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's holding that sponsors of large 401(k) plans like Deere's satisfy their fiduciary obligations to their employees by providing them a wide variety of retail mutual funds in which to invest their retirement savings is profoundly misinformed and has significant implications for employees and retirees throughout the nation. Employers have increasingly come to rely upon defined contribution plans like 401(k) plans, instead of defined benefit plans, as a result of which participants pay more of their plans' costs, and in many plans, the employees pay all those costs. Plans with assets of as little as a few million dollars are large enough to allow employers to negotiate the lower fees that institutional investors pay, rather than the higher fees charged by

retail mutual funds Many employers who maintain both sizable defined contribution and sizable defined benefit plans select mutual funds for their defined contribution plans while the assets in their defined benefit plans are invested in lower-cost alternatives to mutual funds. The Seventh Circuit's decision, however, absolves employers of any responsibility to negotiate such lower, institutional-type fees on behalf of their employees in 401(k) plans, leaving their employees saddled with significantly higher costs.[2]

Financial markets are a collection of many submarkets, each serving the particular needs of a specific type of customer. Retail mutual funds, which are the convenience stores for equity and bond investors, price their services competitively within submarkets serving retail investors who require full-service attention These mutual funds, as a result, typically are not priced competitively for submarkets that serve larger institutional investors, including sizable 401(k) plans, who can buy stocks and bonds through trusts and separate accounts, which are the supermarkets and wholesale outlets for pooled investments These institutional investors are able to achieve substantial economies by buying accounting, administration, and management services *a la carte*, tailoring them to their needs. The substitution of commingled trusts for actively managed mutual

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[2] Over a 30-year career, for example, paying an annual fee of 70 basis points can reduce the purchasing power of savings at the time of retirement by one-eighth

funds in a 401(k) can lead to savings for the plans' participants of 0 70 percent of assets, or more, each year.

We recognize that the market for a commodity like flour has many submarkets. A family needing to replenish its pantry might regard the price of flour in the neighborhood retail store a bargain. But a university food service would purchase its monthly allocation of flour from a wholesaler. Although the price for flour in the neighborhood retail store might be competitive for retail customers, the retail price of flour is not competitive for wholesale customers A university food service buying its provisions in a retail market would be regarded as extravagant.

The Design of Mutual Funds

Retail mutual funds are designed for investors who do not have substantial financial wealth and who wish to build their wealth by investing relatively small sums in stocks or bonds. Retail mutual funds provide these investors the valuable benefits of diversification, brokerage services, legal services, record keeping, and investment management services for a simple fee. This fee typically comprises one-time loads and annual charges per dollar of account balance (the expense ratio). This simple, one-size-fits-all wrap fee can be very appealing and economical for many retail investors, for whom participation in stock and bond investments otherwise would not be economical.

This simple, universal fee for retail mutual funds becomes increasingly unattractive for investors as their account balances grow. Fees increase in proportion with investors' balances, but the cost of accounting, administering, and, perhaps, managing the assets for each account does not increase commensurately Accounting and administration fees, in particular, are essentially the same for each account, regardless of size. Accordingly, more wealthy investors who wished to participate in investment pools historically have placed their money in trust accounts and in separate accounts at financial institutions to gain the benefits of economies of size which are not available from mutual funds. In these wholesale arrangements, wealthier investors typically negotiate the range of services they buy and the price they pay for each service. In many cases, these services are not all provided by the financial institutions that manage the investment pools.

To expand their appeal, most investment companies offer different classes of shares with different fee structures against a single pool. This design tailors fees to match better the interests of different types of investors. For long-term, buy-and-hold investors, pools offer a class of shares with lower annual expense ratios, often accompanied by higher one-time loads. For short-term investors, pools offer a class of shares with no loads, but higher annual expense ratios.

Investment companies also have introduced classes of shares to appeal to investors who maintain

large balances, do not churn their accounts, and do not require all of the services included in the traditional retail product "Institutional shares," for example, require minimum balances of several million dollars and charge shareholders substantially lower fees reflecting the substantially lower accounting and administration expenses per dollar of assets in these accounts. Recently, investment companies also have begun offering exchange traded funds (ETFs) with very low fees against their pools of assets. These shares offer no services other than essential asset management services.

Mutual funds, a retail product, have remained an expensive investment option for institutional investors. Commingled trusts and separate accounts allow institutional investors to unbundle the accounting, legal, administration, and management services they buy. Not only does this unbundling allow them to match the fees to the services they require, but it also permits them to obtain these services from the most economical or suitable providers. For individual retail investors this unbundling would be prohibitively costly, but for institutional investors it is critical for achieving the highest net returns Furthermore, as wholesale products limited to less than 100 accounts, commingled trusts and separate accounts can avoid much of the sales expense as well as the expense for registration and compliance requirements that retail mutual funds incur.

As wholesale vendors, providers of commingled trusts and separate accounts also can restrict their

accounts to investors who maintain adequate balances and consistent cash flows, which reduce the cost of offering these accounts. Larger 401(k) plans can easily meet these requirements. Most commingled trusts require minimum investments of $3 million per account and become significantly less expensive than mutual funds for investments as low as $10 million per account. Many separate accounts require minimum investments exceeding $15 million per account and offer significant savings compared to commingled trusts for investments of $30 million or more per account Lisa Florentine, *Investment Vehicle Matters!* at 1-4 (May 2009), *available at* http.//www.rogerscasey.com/rc/dmdocuments/brief_invvehicle.pdf.

The genius of mutual funds is that they are structured and priced to serve the needs of smaller retail investors relatively economically. As a result, the design and pricing of mutual funds are not competitive in wholesale markets. Consequently, institutional investors – which include foundations, endowments, large defined-benefit pension plans, banks, savings institutions, insurance companies, state and local retirement funds – do not invest a significant share of their assets in mutual funds. Board of Governors of the Federal Reserve System, *Flow of Funds Accounts of the United States* at 71, 75-78, 111, 115 (Sept. 2009), *available at* http://www.federalreserve gov/RELEASES/z1; Investment Company Institute, *The U S Retirement Market, Second Quarter 2009*, RESEARCH FUNDAMENTALS, vol 18, no. 5-Q2, Oct. 2009,

at 7, *available at* http://www.ici.org/pdf/09_q2_retmrkt_update.pdf.

Mutual Funds, Commingled Trusts, and Separate Accounts in 401(k) Plans

With the introduction of 401(k) plans, retail mutual funds were ideally situated to meet the needs of the sponsors of these plans quickly and completely. Investment companies, through their mutual funds, could provide the necessary accounting, legal, administration, and management services for 401(k) plans with minimal effort on the part of sponsors. Moreover, the fee structure of mutual funds meant that sponsors could control the cost of their 401(k) plans by adopting investment companies' funds for their investment options. The participants in the plans would pay for the cost of their mutual fund accounts through the mutual funds' fees to the extent that the employer did not reimburse participants' expenses

As 401(k) plans spread and grew, the aggregate balances in many of these plans became substantial Consequently, the structure and pricing of retail mutual funds became a poor fit for these new institutional investors The larger plans increasingly use commingled trusts and separate accounts as investment options for participants. Deloitte Consulting LLP, Investment Company Institute, *Defined Contribution/401(k) Fee Study* at 14, 20 (June 2009) (hereinafter Deloitte), *available at* http://www.ici.org/pdf/rpt_09_dc_401k_fee_study.pdf; Florentine, *supra*,

at 1-6. Sponsors who had been accustomed to these wholesale investment options within their defined-benefit pension plans instead of mutual funds would be aware of the similar savings that commingled trusts and separate accounts could offer participants in their 401(k) plans.

The savings offered by commingled trusts to large 401(k) plans are significant The median expense ratio for equity mutual funds held in 401(k) plans is near 0 80 percent of assets. Deloitte at 6, 24; Investment Company Institute, *The Economics of Providing 401(k) Plans· Services, Fees, and Expenses 2008*, RESEARCH FUNDAMENTALS, vol. 18, no. 6, Aug. 2009, at 13, *available at* http://www ici.org/pdf/fm-v18n6.pdf; Richard W. Kopcke, Francis M. Vitagliano, & Zhenya S. Karamcheva, *Fees and Trading Costs of Equity Mutual Funds in 401(k) Plans and Potential Savings from ETFs and Commingled Trusts*, at 9, 10, 13 (Ctr. for Retirement Research at Boston College, Working Paper No. 2009-27, November 2009), *available at* http://crr.bc.edu/images/stories/Working_Papers/wp_2009-27.pdf; Roger M. Edelen, Richard Evans, & Gregory B. Kadlec, *Scale Effects in Mutual Fund Performance: The Role of Trading Costs* at 1 (Social Science Research Network, Working Paper No 951367, March 2007), *available at* http·//papers.ssrn com/sol3/papers.cfm?abstract_id=951367. This fee amounts to about $350 for the median participant, who holds an average balance of nearly $50,000. Total administration cost, including recordkeeping expense, currently is less than $50 per year per participant, or less than

0.10 percent of assets for the median participant. DAVID HUNTLEY & JOSEPH VALLETTA, 401K AVERAGES BOOK at 33-34, 45-46 (8th ed. 2007) In large plans, this cost can be less than $10 per participant or 0.03 percent of assets. Commingled trusts currently provide managed funds and funds with different investment styles that can replicate the investment style of many managed mutual funds. The expense ratios for these trusts can range from 0 25 to 0.40 percent of assets. Deloitte at 14, 19, 20, HUNTLEY, *supra*, at 33-34, 45-46 Consequently, these alternatives would reduce overall fees by 0 22 to 0 35 percent of assets ((0.72 – (0.10+0 40)) and (0.72 – (0.10+0.25))).

In addition to these potential savings, commingled trusts containing ETFs also can reduce transaction cost significantly. This saving is greatest for ETFs that replicate the market strategies of actively managed funds. Median trading costs for mutual funds held in 401(k) plans, 0.66 percent of assets, suggests that commingled trusts holding ETFs can reduce trading costs by 0.50 percent of assets, or more, for active strategies Kopcke, *supra*, at 10; Edelen, *supra*, at 1. With this reduction in transaction cost plus the reduction in fees discussed above, commingled trusts and separate accounts holding ETFs that mirror the market exposures of actively managed equity funds could reduce overall fees for participants in 401(k) plans by 0.70 percent of assets or more.

The burden of paying this additional expense is substantial. An additional fee of 0 70 percent of assets

represents about one-tenth of the return, after adjusting for inflation, which participants in 401(k) plans can expect to earn on their investments in equities. Employees who participate in 401(k) plans over 35-year careers can lose more than one-eighth of their potential savings in these plans as a result of this expense For example, suppose new employees earn a salary of $25,000 and receive 4 percent annual raises. If these employees contribute 5 percent of their salaries to 401(k) accounts, investing in equities that return 9 percent a year, they will accumulate balances of $430,200 after 35 years at work. If, instead, the net return on their investment in equities is reduced to 8.3 percent as a result of additional fees and expenses, they will accumulate only $373,800, a drop of 13 percent

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

STEPHEN M. TILLERY
Counsel of Record
KOREIN TILLERY LLC
205 N. Michigan Avenue
Suite 1940
Chicago, IL 60601-4269
(312) 641-9750

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Respondent

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF PETITIONERS

PETER J. WIEDENBECK
Counsel of Record
WASHINGTON UNIVERSITY
SCHOOL OF LAW
One Brookings Drive
Saint Louis, Missouri 63130
(314) 935-6442

November 16, 2009

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INTEREST OF *AMICI CURIAE*[1]

Amici are legal scholars at American universities whose research and teaching interests focus on the law of pensions and deferred compensation and the federal regulation of employee benefit plans.[2] *Amici* have no financial stake in the outcome of this case but are interested in ensuring a uniform and coherent interpretation of the Employee Retirement Income Security Act of 1974 and related provisions of the Internal Revenue Code. We file this brief to urge this Court to clarify the proper scope of the duties owed by plan trustees and other fiduciaries under participant-directed defined contribution plans. We are prompted to submit this brief because the decision in this case will have wide-ranging consequences for tens of millions of American workers and the trillions of dollars they save and invest under 401(k) plans and other participant-directed defined contribution pension plans. These consequences could substantially

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file. No counsel for any party has authored this brief in whole or in part, and no person or entity other than *amici curiae* has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. Counsel for Petitioners filed a letter with the Clerk granting blanket consent to the filing of *amicus* briefs, and a letter reflecting the consent of Respondent to the filing of this brief has been filed with the Clerk. *See id.*

[2] A full list of *amici*, who join this brief as individuals and not as representatives of any institutions with which they are affiliated, is set forth in Appendix 3 to this brief.

impact the standard of living of millions of future retirees.

SUMMARY OF ARGUMENT

Today, the private pension system is overwhelmingly dominated by 401(k) and other defined contribution plans, a large proportion of which call on participants to decide how their account balance should be invested by selecting from a number of options designated by the employer or plan fiduciaries The accumulated retirement saving available under such plans depends in large measure on the investment and plan administration expenses charged to the participant's account. The Seventh Circuit's interpretation of ERISA section 404(c) in this case effectively releases plan fiduciaries from any obligation to monitor or control investment expenses, and encourages plan sponsors to offer a bewildering array of investment alternatives, thereby undermining ERISA's goals of increasing pension savings and promoting better informed employee financial decision making

The lower court's interpretation is erroneously overbroad because it fails to construe the act as a whole and in light of its origins The decision below overlooks related provisions of ERISA, specifically the mandatory trusteeship rule of section 403 and the cofiduciary liability standards of section 405. 29 U.S.C. §§ 1103, 1105. ERISA section 404(c) was intended only to shield the trustee from derivative

liability for losses resulting from imprudent or conflicted investment decisions *by the participant* that were made possible by improper delegation (trustee enablement of the participant's breach). Consequently, claims premised on imprudence or disloyalty *by the trustee* in the selection or continuance of investment alternatives, as is alleged in this case, should not be barred.

Dismissal of the complaint under Federal Rule of Civil Procedure 12(b)(6) presents the Court with a pure question of law that is well suited to final resolution. The lower court's speculation that high retail fees might be justified by provision of extensive services is an improper basis for dismissal on the pleadings

INTRODUCTION

Congress declared that the policy of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S C. §§ 1001-1461 (2006), is "to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal Courts." ERISA § 2(b), 29 U S.C. § 1001(b). The issues presented in this case will directly affect the *retirement income security* of tens of millions of Americans The

federal courts have labored for 35 years to adapt the competing policies that animate ERISA into a stable and coherent body of law. *See generally* Peter J. Wiedenbeck, ERISA in the Courts 17-26 (Fed Jud Ctr. 2008) (hereinafter ERISA in the Courts) In this case, the Seventh Circuit adopted an interpretation of the scope of obligations owed by defined contribution pension plan fiduciaries to participants, in situations where the plan calls for participant-directed investments. Its interpretation conflicts with the view of the Fourth Circuit, *DiFelice v. U S. Airways, Inc.*, 497 F.3d 410 (4th Cir. 2007), and the consistent interpretation of the Department of Labor, threatens to upset the balance between ERISA's competing policies, and undermines *the* central goal of the legislation (as advertised by the act's title).

The petition for writ of certiorari presents the issues, highlights the division among the lower courts, and explains the conflict between the Seventh Circuit's approach and the longstanding construction of the Department of Labor. This brief is submitted to call the Court's attention to three additional relevant matters First, in the wake of the transformation of the private pension system from a regime dominated by traditional defined benefit pension plans to one characterized by the primacy of 401(k) and other defined contribution plans, the decision below will make it harder for millions of American workers to accumulate adequate retirement savings. Second, the decision below overlooks related sections of the statute and fails to construe ERISA as a whole, thereby

obstructing development of a coherent body of employee benefit law. Third, the issues presented in this case are well suited to review and final resolution.

REASONS FOR GRANTING THE PETITION

I. AS APPLIED TO THE EXISTING PRIVATE PENSION SYSTEM, DOMINATED AS IT IS BY 401(k) AND OTHER DEFINED CONTRIBUTION PLANS, THE DECISION BELOW UNDERMINES NATIONAL PENSION POLICY

Since ERISA was enacted the private pension system has shifted from dependence on defined benefit plans, under which the plan sponsor bears the risk of investment performance, to predominant reliance on defined contribution plans, under which the participants shoulder all investment risk. Today, most 401(k) plans and many other defined contribution plans permit participants to control the investment of their account assets by selecting from among a range of options offered under the plan. The selection of investment alternatives whose net rate of return is depressed by unnecessarily high expenses inhibits the growth of the participant's account balance, and over an extended period can substantially retard the accumulation of retirement savings, posing a threat to the adequacy of retirement income The decision below threatens to expose millions of workers to inappropriate investment choices for their pension

savings, jeopardizing their standard of living in retirement.

"Assurance of integrity is the heart and soul of ERISA. Federal fiduciary standards were designed to work in combination with improved disclosure and powerful enforcement tools . . to stem misconduct in plan administration." ERISA in the Courts, *supra*, at 141 (citing S. Rep No. 93-127, at 27-28, 29 (1973)). As this Court has recognized, "The focus of the statute thus is on the administrative integrity of benefit plans." *Fort Halifax Packing Co v. Coyne*, 482 U.S. 1, 15 (1987).

> In view of Congress's objective to stamp out mismanagement and abuse of employee benefit funds, one might expect that ERISA's fiduciary duties, reinforced by objective prohibited-transaction rules, would apply with special force to investment decision making. While intensive oversight is the norm for defined benefit pension plans and welfare benefit funds, the fiduciaries of many defined contribution pension plans are largely absolved of investment responsibility That absolution is granted where a plan permits a participant or beneficiary to exercise control over the investment of assets in his own account and the participant or beneficiary actually exercises such control. If the sponsor washes its hands of investment management, ceding responsibility to plan participants and beneficiaries, then fiduciary obligations are relaxed on the theory that employer abuse of pension funds is no longer

> a concern Instead, the focus in this situation should be on worker autonomy and promoting informed financial decision making.

Peter J Wiedenbeck, ERISA: Principles of Employee Benefit Law (forthcoming 2010) (footnotes omitted) (hereinafter ERISA Principles).[3]

In the years since ERISA was enacted the private pension system has undergone a dramatic shift away from traditional defined benefit plans, under which each participant is promised a life annuity, the value of which is typically based on a formula that takes into account the participant's compensation and length of service. Formerly defined benefit plans served as the exclusive or primary source of retirement savings for most American workers. Today, defined contribution pension plans, and 401(k) plans in particular, have become the backbone of the private pension system. Under a defined contribution plan the participant's retirement savings depend upon the amount contributed to an individual account, increased by any income or gains and decreased by any losses or expenses that are allocated to the account.[4]

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[3] Excerpts from this work are used herein with permission of Oxford University Press Citations refer to the location of material in the first page proofs of the book, final pagination might vary slightly

[4] Depending on the terms of the plan, a participant's account may also be increased by a share of forfeitures of the accounts of other participants ERISA alternatively refers to defined contribution plans as "individual account plans " ERISA § 3(34), 29 U S C § 1002(34)

Contributions may be made by the plan sponsor (employer), the participant (employee), or both, and the annual amount contributed typically depends upon the employee's compensation (and sometimes other factors). Between 1975 and 2004 the proportion of pension plan participants enrolled in defined benefit plans decreased from about 70 percent to about 30 percent Robert Clark & John Sabelhaus, *How Will the Stock Market Crash Affect the Choice of Pension Plans?*, 62 Nat'l Tax J. 477, 482 (2009) This sea change is vividly illustrated by Labor Department data graphed in Figure 1 (Appendix 1) and Figure 2 (Appendix 2), below.

Today, there are 12 times as many defined contribution plans as defined benefit plans in operation (Figure 1), and the data show that since ERISA was enacted the ratio of the number of workers covered by a defined benefit plan to the number of workers covered by a defined contribution plan has fallen from about 300 percent to only 40 percent (Figure 2). Many factors, including economic and demographic changes, labor and tax law regulation, and the harnessing of political ideology to social psychology, have contributed to this astounding turn-around. Edward A. Zelinski, The Origins of the Ownership Society 31-92 (Oxford Univ. Press 2007) (explaining in detail how "the defined contribution paradigm became entrenched in American retirement, tax, and social policy").

The recent rise to dominance of defined contribution plans, and 401(k) plans in particular, has been

accomplished, in large part, by a shift to plans that call for participant-directed investments. According to a recent study, the proportion of defined contribution plan participants who manage the investment of some or all of their account assets rose from 15 to 86 percent between 1986 and 2005. Participant direction was particularly prevalent in 401(k) plans, where, by 2005, about 95 percent of participants had some say over the investment of their accounts. William E. Even & David A. Macpherson, *The Growth of Participant Direction in Defined Contribution Plans*, IZA (Institute for the Study of Labor) Disc. Paper No. 4088, at 2, 23 (Mar. 2009), http://papers.ssrn com/sol3/papers cfm?abstract_id=1369834#. Consequently, the triumph of the "defined contribution paradigm" has worked a substitution of worker choice for professional investment decision making by the plan trustee or investment manager. Considering only 401(k) plans, roughly 40 million workers are now left to fend for themselves when it comes to investing for their retirement. The net rate of return that such participants earn, together with the riskiness of their portfolio choices, will determine whether today's workers will struggle with cramped budgets throughout their "golden years" or instead enjoy comfortable retirements As the Government Accountability Office recently reported to the Chairman of the Committee on Ways and Means, "Lower fees benefit plan participants because they can significantly increase long-term retirement savings. [E]ven a relatively small annual fee taken from a worker's assets represents a large amount of money had it been reinvested over

time " GAO, Retirement Savings: Better Information and Sponsor Guidance Could Improve Oversight and Reduce Fees for Participants 20-21 (2009) (GAO-09-641) (referring to a graph showing that 1-percentage point higher annual fees on a $20,000 defined contribution plan investment reduces the account balance over 20 years by about $10,000).

The decision below immunizes careless or disloyal fiduciary decision making in assembling investment alternatives under a participant-directed defined contribution plan. Such plans have become the dominant mode of private pension saving. Applied as precedent, this decision would threaten the retirement income security of millions of Americans. It might undermine national pension policy in another way as well, because the Seventh Circuit's opinion could encourage fiduciaries to include hundreds or thousands of investment options. *But see Hecker v. Deere & Co* , 569 F.3d 708, 711 (7th Cir. 2009) (disavowing the implication that a plan fiduciary "can insulate itself from liability by the simple expedient of including a very large number of investment alternatives in its portfolio and then shifting to the participants the responsibility for choosing among them"). Such a proliferation of choices is likely to result in workers constructing less rational portfolios than occurs when an employer offers only a small number of investment choices *See* Ning Tang *et al.*, *The Efficiency of Pension Menus and Individual Portfolio Choice in 401(k) Pensions*, Univ. of Michigan Retirement Res. Ctr. Working Paper No 2009-203, at

2 (Aug. 2009), http://www.mrrc.isr.umich.edu/publications/papers/pdf/WP203.pdf ("we show that, instead of simply adding funds to a plan menu, it is preferable to design a smarter menu and get participants to select the right set of fund choices") Promoting better-informed employee financial decision making was a central goal of ERISA. ERISA in the Courts, *supra*, at 18-19.

II. THE DECISION BELOW OVERLOOKS RELATED PROVISIONS OF ERISA AND FAILS TO CONSTRUE THE ACT AS A WHOLE

ERISA section 404(c) provides that if a participant or beneficiary is granted and exercises control over assets in his account in the manner provided by Labor Department regulations, then "no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control." ERISA § 404(c)(1)(B), 29 U.S.C. § 1104(c)(1)(B). Accordingly, the defense applies if (1) regulatory conditions for the exercise of control are satisfied, and (2) the loss "results from" such an exercise of control. A regulation issued in 1992 provides detailed guidance on the conditions that must be satisfied for a plan to be considered to give participants the opportunity to exercise independent control over the assets in their accounts, 29 C.F.R. § 2550.404c-1, yet as this case illustrates, where a plan complies with the regulation the breadth of the defense (i.e., whether

the loss "results from" participant's exercise of control) remains unsettled.

The Seventh Circuit found ERISA section 404(c) shields Deere from claims that it assembled an imprudent menu of investment alternatives because the Deere plans "include[] a sufficient range of options so that the participants have control over the risk of loss." *Hecker v. Deere & Co.*, 556 F.3d 575, 589, *supplemented by* 569 F.3d 708 (7th Cir. 2009). While not entirely clear, that conclusion seems to be based upon a plain meaning reading of the statute. *See Hecker*, 556 F.3d at 58; *In re Unisys Savings Plan Litigation*, 74 F 3d 420, 445 (3d Cir. 1996) (statute's plain language provides that the fiduciary is excused from liability for "any loss" which "results from" a participant's exercise of control). The Fifth Circuit has suggested that section 404(c) protects plan fiduciaries who select investment alternatives in a careless or self-serving manner on the theory that, absent such a breach of fiduciary obligation, the defense would be unnecessary. *Langbecker v. Electronic Data Systems Corp.*, 476 F 3d 299, 311 (5th Cir. 2007) (the Labor Department's interpretation "would render the § 404(c) defense applicable only where plan managers breached no fiduciary duty, and thus only where it is unnecessary"). Both the plain meaning and the surplusage approaches lead to a mistakenly overbroad interpretation of the section 404(c) defense because each overlooks related provisions of ERISA and fails to construe the act as a whole. As explained below, section 404(c) was designed only to protect plan

fiduciaries from the derivative liability that participant-directed investments would otherwise trigger due to the operation of ERISA's mandatory trusteeship and cofiduciary liability rules, ERISA §§ 403, 405, 29 U.S.C. §§ 1103, 1105.

> Resort to a broader perspective – interpreting ERISA as a whole and in the context of its trust law origins – supports the Labor Department's position that "[a]ll of the fiduciary provisions of ERISA remain applicable to both the initial designation of investment alternatives and investment managers and the ongoing determination that such alternatives and managers remain suitable and prudent investment alternatives for the plan." Preamble to 29 C.F.R. § 2550.404c-1, 57 Fed. Reg. 46,906, 46,922 (Oct. 13, 1992). The key to understanding section 404(c) lies in its relationship to sections 403 and 405, the mandatory trusteeship and cofiduciary liability provisions of ERISA.
>
> Investment management, including the authority to acquire, hold, or dispose of plan assets, is a trustee function. ERISA section 403(a) makes investment management by the trustee(s) a mandatory, nondelegable duty. "the trustee or trustees shall have *exclusive* authority to manage and control the assets of the plan." ERISA § 403(a), 29 U.S.C. § 1103(a) (emphasis added). The only exceptions are for (1) plans that call for investment management to be under the direction of a named fiduciary and (2) plans that

allow the named fiduciary to appoint one or more investment managers to whom the authority to manage, acquire, and dispose of assets is delegated. ERISA §§ 403(a)(1), (a)(2), 402(c)(3), 29 U S C. § 1103(a)(1), (a)(2), 1102(c)(3). That the duty to make investment decisions is personal and nondelegable is confirmed by ERISA's rules governing cofiduciary liability. Dovetailing with the exceptions to the trustee's exclusive responsibility for asset management, section 405 provides that a trustee is absolved from liability (1) for following the instructions of a named fiduciary where the plan provides for investment management by a named fiduciary, and (2) for the acts or omissions of investment managers where the plan provides for delegation of the investment duties to one or more investment managers *Compare* ERISA § 403(a)(1), (a)(2), 29 U.S.C. § 1103(a)(1), (a)(2), *with* ERISA § 405(b)(3)(B), (d)(1), 29 U.S.C § 1105 (b)(3)(B), (d)(1). Most revealing is section 405(c), which generally allows a plan to specify procedures for the delegation of *any* fiduciary responsibility, and correspondingly limits the liability of other fiduciaries for the acts or omissions of a proper delegate. The statute expressly restricts that blanket delegation authority in one respect· delegation is forbidden for "trustee responsibilities," defined as any responsibility "to manage or control the assets of the plan" ERISA § 405(c)(1), (c)(3), 29 U.S C § 1105(c)(1), (c)(3)

Because investment management is in general a nondelegable trustee function, in

> the absence of section 404(c), a trustee who permitted participants or beneficiaries to direct the investment of their accounts would . . . breach [his] fiduciary duty.[5] Consequently, the trustee would be personally liable for any losses resulting from that breach, including losses flowing from imprudent investment decisions made by the account owner. ERISA § 409(a), 29 U.S.C § 1109(a). Even if the plan expressly called for participant decision making, the trustee's exposure would not be limited. *See* ERISA §§ 404(a)(1)(D) (cannot follow plan terms if in conflict with ERISA), 410(a) (exculpatory provisions void as against public policy), 29 U.S.C. §§ 1104(a)(1)(D), 1110(a). Therefore, absent section 404(c), the trustee who allowed participants or beneficiaries to direct the investment of their own accounts would be liable as a cofiduciary for certain losses caused by their investment decisions. Specifically, the participants granted investment authority would, due to the

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[5] Many participant-directed plans provide in the plan document that each participant is a "named fiduciary" with the power to direct the investment of his own individual account That formal designation renders the participant a cofiduciary with the trustee, and potentially subjects the trustee to cofiduciary liability under section 405(a)(3) based on knowledge of the participant's breach and failure to take remedial action The directed trustee defense of section 405(b)(3)(B) expressly does not apply to section 405(a) violations Accordingly, just as in the case where no such designation is made and the participants function as de facto fiduciaries (discussed in the text), the cofiduciary liability analysis applies where the plan formally designates participants as named fiduciaries

> improper delegation of trustee responsibilities, be acting as de facto or functional fiduciaries.[6]

ERISA Principles, *supra*, at 140-42 (footnotes added; original footnotes incorporated in text)

> Therefore, if such a participant's investment selection is imprudent, or underdiversified, or involves a conflict of interest (e.g., investing in securities of a business that a participant or her spouse owns or controls), then the loss is caused by a breach of fiduciary responsibility, and the trustee would be personally liable for the loss as a cofiduciary.

Id. at 142. The trustee, that is, would be liable for actions (impermissible delegation) that enabled the breach by another (de facto) fiduciary. ERISA § 405(a)(2), 29 U.S.C. § 1105 (a)(2). Moreover, the trustee would be subject to suit by the very participant whose investment choice constituted a breach. the participant has standing to bring a civil action under ERISA section 502(a)(2) to enforce fiduciary obligations against the trustee. 29 U.S.C. § 1132(a)(2).

"The effect of section 404(c), where it applies, is to create a narrow exception to the foregoing rules,

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[6] *E.g.*, *Hamilton v. Allen-Bradley Co.*, 244 F.3d 819 (11th Cir. 2001) (employer that exercised actual control over claim process by failure to timely provide application for long-term disability benefits was a de facto fiduciary), Explanation of H.R. 12906, 120 Cong. Rec. 3983 (1974) ("Conduct alone may in an appropriate circumstance impose fiduciary obligations."), ERISA in the Courts, *supra*, at 144

absolving the plan trustee from liability for losses caused by undiversified, imprudent, or conflicted investment decisions made by participants or beneficiaries." ERISA Principles, *supra*, at 142. Observe that section 404(c), besides giving the trustee an affirmative defense, also provides that the participant or beneficiary who exercises control over her account "shall not be deemed to be a fiduciary by reason of such exercise". If the participant cannot be deemed a (de facto) fiduciary, then the trustee cannot be liable as a cofiduciary under section 405(a)(2) for enabling the participant's breach. In contrast,

> a delegation of investment decision making that does not comport with section 404(c) is itself a breach (violation of ERISA's mandatory trusteeship rule), even if there is no showing of independent fault by the fiduciary (e.g., imprudence) in initially selecting or continuing to make available designated investment alternatives.[7] Because the trustee

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[7] The fiduciary of a plan that does not satisfy the conditions of the regulation is not entitled to the defense of § 404(c), but the regulation states that its standards do not speak to whether the fiduciary of a non-compliant plan has breached his obligations 29 C F R § 2550 404c-1(a)(2) (2009), Preamble to 29 C F R § 2550 404c-1, 57 Fed Reg 46,906 (Oct 13, 1992) ("[N]on-complying plans do not necessarily violate ERISA; non-compliance merely results in the plan not being accorded the statutory relief described in section 404(c) ") *Jenkins v Yager*, 444 F 3d 916, 924 (7th Cir 2006), relied on these provisions to find an "implied exception" to ERISA §§ 403 and 405 was available to a plan that allowed participants to select investments but that did not satisfy § 404(c) *Id* at 923-24 Instead of finding that an automatic breach resulted from the delegation of investment

(Continued on following page)

> would be responsible for losses attributable to the account owner's mistakes where the menu of investment alternatives was properly constructed, the defense has a real immunizing effect. It follows that section 404(c) cannot be considered surplusage if its operation is limited to that situation.[8]

ERISA Principles, *supra*, at 142 (footnotes added; original footnotes omitted).

> This contextual and functional reading of section 404(c) is consistent with and lends

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choice, the court reviewed the selection and monitoring of investment alternatives and the provision of information to plan participants for prudence *Id* at 924-26 The interpretation of the relationship between § 404(c) and §§ 403 and 405 presented above indicates that *Jenkins* was wrongly decided

[8] ERISA section 404(c), in combination with section 403(a), can be viewed as providing a third exception to the ban on delegation of investment management, along with a corresponding narrow limitation on trustee liability, that is applicable to plans that do not formally designate participants as named fiduciaries

> In effect, then, the trustee is solely responsible for investment management except where (1) the plan assigns that task to a named fiduciary, (2) the plan authorizes delegation to one or more investment managers, or (3) a defined contribution plan permits a participant or beneficiary to exercise control over the assets in his account, and such control is actually exercised in accordance with the standards of § 404(c) In addition, the trust instrument may permit multiple trustees to divvy up investment management tasks and in so doing limit their exposure for breaches by a cotrustee ERISA § 405(b)(1)(B), 29 U S C § 1105(b)(1)(B)

ERISA Principles, *supra*, at 142 n 147

support to the Labor Department's interpretation of the limited scope of the defense. Traditional trust law similarly provides that a trustee is under a duty not to delegate investment decision making. Restatement (Second) of Trusts § 171 & cmt. h (1959). Further, the trustee of a private trust is liable for the acts of an agent "which if done by the trustee would constitute a breach of trust, if the trustee . . . (b) delegates to the agent the performance of acts which he was under a duty not to delegate " Restatement (Second) of Trusts § 225(2). *See also id.* § 224(2)(b) (liability for improper delegation to cotrustee) [T]he Supreme Court has recognized that ERISA's fiduciary obligations "draw much of their content from the common law of trusts" and "reflect[ ] a special congressional concern about plan asset management . . " *Varity Corp. v. Howe*, 516 U.S 489, 496, 511 (1996); *accord*, *LaRue v DeWolff, Boberg & Assocs.*, 128 S. Ct 1020, 1024 n 4 (2008).

ERISA's legislative history also seems consistent with this interpretation of section 404(c). Reports on early versions of comprehensive pension reform bills in both the House and Senate indicate that the bills were intended to allow participant-directed investments in certain circumstances.[9] The

[9] S Rep No 93-127, at 29 (Apr 18, 1973), observes

It is not the intention of the Committee, however, that where the sole power of control, management or disposition

(Continued on following page)

Senate version of H.R. 2 did not expressly authorize participant-directed investments, apparently because it did not need to. Instead, it defined fiduciary broadly enough to include participants with power to control investments and also permitted agreements "allocating specific duties or responsibilities among fiduciaries" H.R. 2, 94th Cong. §§ 511, 502(a) (1974) (version passed by the Senate on Mar. 4, 1974, [which would have amended] the Welfare and Pension Plans Disclosure Act). In contrast, the House version of H.R. 2 provided that assets shall be held in trust by one or more trustees "who shall have exclusive authority and discretion to manage, and exclusive control of, the assets of the plan" H.R 2, 94th Cong § 111(e) (1974) (version passed by House Feb 28, 1974). That *exclusive* authority was subject to exceptions for investment directions by named fiduciaries (called "administrators" in this bill) and investment managers, and permitted allocation of duties among multiple trustees, but it did not contain an exception for participant-directed investments. Accordingly, it appears that compliance with a plan provision allowing participant-directed

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with respect to plan funds rests with the participants themselves, as may be the case with respect to certain plans where the participant has the sole discretion over an individual account established in his name, that such participants shall be regarded as fiduciaries

Accord H R Rep No 93-533, at 11 (Oct 2, 1973) (same)

> investments would have subjected the trustee to liability. Against this background, section 404(c) was added in conference. Apparently, when the conference committee adopted the House's approach, making investment management a (generally) nondelegable trustee function, someone realized that the limited exceptions contained in the House version of the bill would, as a practical matter, rule out participant-directed investments.

ERISA Principles, *supra*, at 143-44 (some footnotes incorporated in text).

Properly understood, "ERISA section 404(c) was intended only to shield the trustee from derivative liability for losses resulting from imprudent or conflicted investment decisions *by the participant* that were made possible by improper delegation (trustee enablement of the participant's breach, that is)." ERISA Principles, *supra*, at 144. Consequently, "claims premised on imprudence or disloyalty *by the trustee* in the selection or continuance of investment alternatives," as is alleged in this case, "should not be barred " *Id.*

III. THE ISSUES PRESENTED IN THIS CASE ARE WELL SUITED TO REVIEW AND FINAL RESOLUTION

The question of the scope of the section 404(c) defense has had time to percolate in lower courts, and the views of the Labor Department, the expert agency

charged with administration of ERISA's fiduciary responsibility rules, have been formulated, tested, and reinforced over the course of four presidential administrations. Dismissal of the complaint under Federal Rule of Civil Procedure 12(b)(6) presents the Court with a pure question of law that is well suited to final resolution.

Without discovery it is peculiarly inappropriate to dismiss the suit on the basis of speculation that high retail fees might be justified by provision of extensive services, as the Seventh Circuit did here. *Hecker*, 569 F.3d at 711. Discovery is necessary to rule out other explanations, such as disloyalty or imprudence. A plausible explanation of high fees is that the fund provider may in fact be providing extensive services, but discovery might show that those services are rendered to the employer rather than to the plan participants. If, for example, the mutual fund provider manages other employee benefit plans (such as executive deferred compensation programs) for the sponsor of a section 404(c) plan, the administration of those other plans might be provided at a reduced cost as part of a bundled service agreement. Such a package deal would mean that the high fees charged to the defined contribution pension plan participants are subsidizing the operation of some other plan. ERISA case law on fiduciary obligations establishes that administering one plan in a way that provides advantages to the participants of some other plan of the same employer breaches the exclusive benefit rule, even if there is overlap in the membership of the

two plans. *See* ERISA in the Courts, *supra*, at 159-60 (pension plan fiduciary violates the exclusive benefit rule if he acts to advance plan participants' interests in continued employment – wages or other benefits – rather than in retirement benefits). This scenario is of course pure (counter-) speculation, but it shows that resolution of the Petitioner's claim requires the opportunity to develop evidence.

CONCLUSION

Because of the importance of the issues presented to the effectuation of national pension policy and the development of a coherent body of employee benefit law, the petition for writ of certiorari should be granted.

Respectfully submitted,

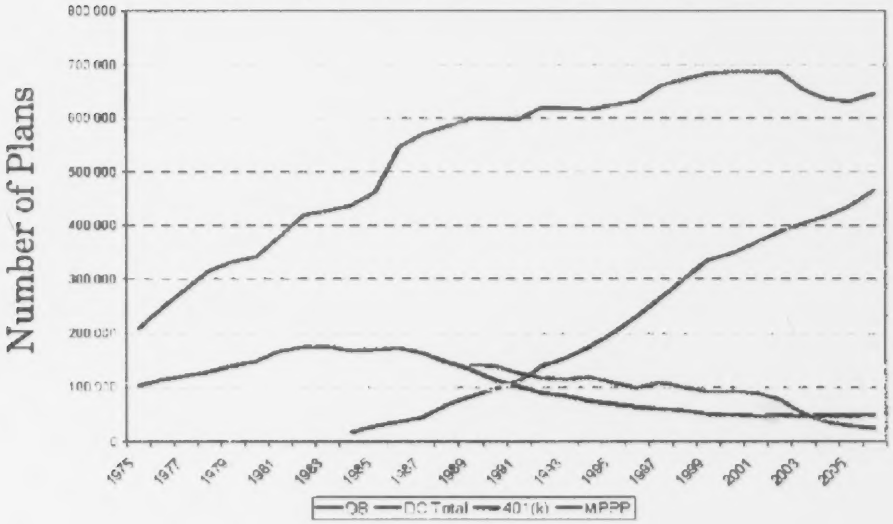
PETER J. WIEDENBECK
Counsel of Record
WASHINGTON UNIVERSITY
SCHOOL OF LAW
One Brookings Drive
Saint Louis, Missouri 63130
(314) 935-6442

November 16, 2009

APPENDIX 1

Figure 1[1]

Number of Private Pension Plans:
DB, DC, 401(k) & MPPP, 1975-2006



DB = defined benefit plans, DC Total = defined contribution plans of all types; 401(k) = plans containing cash-or-deferred arrangement; MPPP = money purchase pension plans. DC Total includes the number of 401(k) plans and MPPPs each year (graphed separately) as well as other varieties of DC plans

Source. Employee Benefit Security Administration (EBSA), U S. Department of Labor, Private Pension Plan Bulletin Historical Tables and Graphs, Tables E1, E8 & E20 (Feb 2009) (DB, DC Total and 401(k) data); EBSA, Private Pension Plan Bulletin: Abstract

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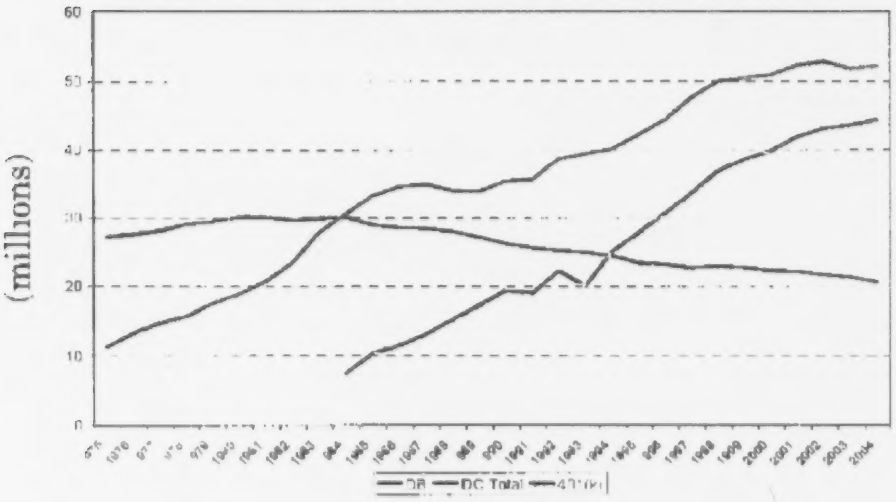
[1] Figure 1 is taken from ERISA PRINCIPLES 350 (Figure 10-4)

of Form 5500 Annual Reports, Table A1 (annually, 1989-2006) (MPPP data).

APPENDIX 2

Figure 2[2]

Number of Active Private Pension Plan Participants DB, DC and 401(k), 1975-2004



DB = defined benefit plans, DC Total = defined contribution plans of all types, 401(k) = plans containing cash-or-deferred arrangement DC Total includes the number of 401(k) plans each year (graphed separately) as well as other varieties of DC plans.

Source. Employee Benefit Security Administration (EBSA), U S. Department of Labor, Private Pension Plan Bulletin Historical Tables and Graphs, Tables E1, E8 & E20 (Feb. 2009) (DB, DC Total and 401(k) data); EBSA, Private Pension Plan Bulletin Abstract

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[2] Figure 2 was prepared for use in PETER J WIEDENBECK & RUSSELL K OSGOOD, EMPLOYEE BENEFITS (2d ed 2011) (forthcoming from Thomson-West)

of Form 5500 Annual Reports, Table A1 (annually, 1989-2006) (MPPP data).

APPENDIX 3

List of *Amici*

1. Karen Burke – burkek@sandiego.edu
   Warren Distinguished Professor of Law
   University of San Diego School of Law

2. Colleen Medill – cmedill2@unl.edu
   Warren R. Wise Professor of Law
   University of Nebraska College of Law

3. Dana Muir – dmuir@bus.umich.edu
   Arthur F. Thurnau Professor of Business Law
   Stephen M. Ross School of Business
   University of Michigan

4. Paul M. Secunda – paul.secunda@marquette edu
   Associate Professor of Law
   Marquette University Law School

5. Susan Stabile – sjstabile@stthomas.edu
   Robert and Marion Short Distinguished
   Chair in Law
   University of St. Thomas School of Law

6. Norman Stein – nstein@law.ua.edu
   Douglas Arant Professor of Law
   University of Alabama School of Law

7. Peter J. Wiedenbeck – pwiedenbeck@law.wustl.edu
   Joseph H. Zumbalen Professor of the
   Law of Property
   Washington University School of Law

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In The

Supreme Court of the United States

DENNIS HECKER, JONNA DUANE,
AND JANICE RIGGINS,

Petitioners,

v

DEERE & COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF *AMICUS CURIAE* FRANK S. RAVITCH AND MARCIA L. McCORMICK IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

PROFESSOR FRANK S RAVITCH
MICHIGAN STATE UNIVERSITY
College of Law
Room #315
Law College Bldg.
East Lansing, MI 48824
(517) 432-6973

Counsel of Record

DEBRA HAYES
REICH AND BINSTOCK, LLP
Of Counsel
4265 San Felipe, Ste 1000
Houston, TX 77027
(713) 622-7271

November 16, 2009

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
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INTEREST OF THE *AMICUS*[1]

Amicus, Frank S. Ravitch and Marcia L. McCormick, are scholars at American law schools whose interests focus on labor law, employee rights, or the law of investment funds.[2] *Amicus* have no financial stake in the outcome of this case but are interested in ensuring a uniform and coherent interpretation of ERISA We file this brief to urge this Court to clarify the proper scope of the fiduciary duties that plan fiduciaries owe to employee/beneficiaries with respect to the menu of options defined contribution or 401(k) plans supply to their employees. We are prompted to submit this brief because the decision in the case below, and the conflict among the circuits which it augments, has wide-ranging consequences for millions of American employees and the hundreds of billions of dollars invested in 401(k) plans

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[1] No counsel for any party has authored this brief in whole or in part, and no person or entity other than *amicus curiae* and their counsel has made a monetary contribution to the preparation or submission of this brief *See* SUP CT R 37 6 Counsel for petitioners filed a letter with the Clerk granting blanket consent to the filing of *Amicus* briefs A letter reflecting the consent of respondent to the filing of this brief has been filed with the Clerk of the Court The parties were notified ten days prior to the due date of this brief of the intention to file

[2] Frank S Ravitch is a Professor of Law at Michigan State University College of Law Marcia L McCormick is an Associate Professor of Law at Saint Louis University School of Law

ARGUMENT

I. The Seventh Circuit's Decision in this Case Will Foster Confusion for Employers and Employees Whose Plans are Subject to ERISA Because it is Inconsistent with the Nature of ERISA, Department of Labor Interpretations, and Significant Precedent

Petitioners Dennis Hecker, Jonna Duane, and Janice Riggins alleged in their well pleaded complaint that respondent violated its fiduciary duties under ERISA by delegating the operation of respondent's plan to Fidelity. Second Amended Complaint for Breach of Fiduciary Duty, *Hecker, et al v. Deere & Co., et al* (W.D. Wis., No 06-C-719-S, decided June 21, 2007) (complaint filed March 6, 2007). In doing so respondents failed to adequately monitor the plans, failed to assess whether fiduciary choices for the plan were appropriate for a plan of respondent's size, failed to determine the reasonableness of fees charged by Fidelity, and failed to address fiduciary's self dealing within the plan *Id* As a result, petitioners assert that respondent failed to live up to its fiduciary duties under §1132's requirements for plan fiduciaries. *Id* Given the increasing shift from defined benefit plans to defined contribution plans throughout the nation, the need for prudent management of 401(k) plans has never been more important, and confusion over the duties owed to plan beneficiaries by plan fiduciaries under ERISA has never been more risky to the health of our economy. Yet, the Seventh

Circuit panel upheld dismissal of petitioners' complaint on the pleadings with prejudice. *Hecker v Deere*, 556 F.3d 575 (7th Cir. 2009), *suppl. by Hecker v. Deere*, 569 F.3d 708 (7th Cir. 2009). The panel did so based on its reading of the so called "safe harbor" provision contained in ERISA §404(c), and by disregarding conflicting interpretations and precedent, including the interpretation of the "safe harbor" provision by the Department of Labor (DOL).

By artificially constraining the DOL's considered interpretation of the "safe harbor" provision in ERISA §404(c), *Final Regulation Regarding Participant Directed Individual Account Plans (ERISA Section 404(c) Plans)*, 57 FED. REG 46,906, 46,922 (October 13, 1992), 29 C F.R Part 2550.404c-1(d)(2) ("safe harbor" provision does not apply to "the act of designating investment alternatives"), ignoring long understood interpretations of ERISA, *Varity Corp. v. Howe*, 516 U.S. 489, 513 (1996) ("Given [Section 404(a)'s] objectives, it is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries a remedy"); *Fort Halifax Packing v. Coyne*, 482 U.S. 1, 15 (1987) (ERISA's focus "is on the administrative integrity of benefit plans – which presumes that some type of administrative activity is taking place"), *see also*, *Commissioner v. Clark*, 489 U.S. 726, 739-40 (1989) (when considering an exception to a general policy, courts "usually read the exception narrowly" to "preserve the primary operation of the policy"); *Phillips v. Walling*, 324 U.S

490, 493 (1945) (holding in context of the Fair Labor Standards Act that "[a]ny exemption from such humanitarian and remedial legislation must therefore be narrowly construed. . . To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretive process and to frustrate the announced will of the people"), and rejecting conflicting precedent on a motion to dismiss, *DiFelice v. U.S. Airways, Inc*, 497 F.3d 410, 418 n.3 (4th Cir. 2007) (§404(c) "safe harbor" does not preclude claims based on imprudent selection of investment alternatives"); *In re Tyco Int'l, Ltd Multidistrict Litigation*, 606 F. Supp. 2d 166, 169 (D.N.H. 2009) (same); *Tatum v. R.J. Reynolds Tobacco Co.*, 254 F.R.D. 59, 65-66 (M.D.N.C. 2008) (same), the Seventh Circuit panel's decision creates confusion for employees and employers.

Employers in a variety of jurisdictions may now act based on the Seventh Circuit's decision only to find that their jurisdiction interprets the relevant provisions of ERISA differently from the Seventh Circuit based on the principles that ERISA is meant to be interpreted broadly in favor of plan beneficiaries. *John Hancock v. Harris Trust and Savings Bank*, 510 U.S. 86, 96 (1993) (noting connection between ERISA's "broadly protective purposes" and its fiduciary standards); *Central States v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985) ("In general, trustees' responsibilities and powers under ERISA reflect Congress' policy of 'assuring the equitable character of the plans.' Thus, rather than explicitly

enumerating all of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility"). ERISA exemptions should be construed narrowly. *Varity Corp.*, 516 U S. at 513; *Fort Halifax Packing*, 482 U.S. at 15; *Commissioner v. Clark*, 489 U.S at 739-40; *Phillips v Walling*, 324 U.S. at 493 The Seventh Circuit failed to heed that precedent in this case, and did so in direct contravention of the DOL's considered interpretation. 57 FED. REG. 49,906, 46,922 (Oct. 13, 1992); Brief of the Secretary of Labor, Elaine L. Chow, as Amicus Curiae in Support of Plaintiffs-Appellants, *Hecker v. Deere*, No. 07-3605, 08-1224 (7th Cir Mar. 19, 2008); Brief of the Secretary of Labor, Hilda L Solis, as Amicus Curiae in Support of Panel Rehearing, *Hecker v. Deere*, No. 07-3605, 08-1224 (7th Cir. Mar. 20, 2009).

The Seventh Circuit panel's failure to interpret the "safe harbor" exemption narrowly is also significant because as a practical matter most employees do not have the resources to make the best bargain with employers regarding the menu of options available to them under 401(k) plans, and these resources decrease as education levels among employees decrease. S Benartzi & R.H. Thaler, *Heuristics and Biases in Retirement Savings Behavior*, 21 J. OF ECONOMIC PERSP 81 (2007). Munnell & Sunden, COMING UP SHORT: THE CHALLENGE OF 401(K) PLANS (Brookings Inst. Press 2004). Thus, this Court's holdings that exemptions to general fiduciary duties under ERISA

are to be interpreted narrowly, *Varity Corp* , 516 U.S. at 513; *Fort Halifax Packing*, 482 U S. at 15; *Commissioner v. Clark*, 489 U.S. at 739-40, *Phillips v. Walling*, 324 U.S. at 493 (1945), are not only consistent with ERISA, but also with the practical reality faced by employees in defined · contribution plans throughout the nation

This reality is further complicated by the fact that employers currently have different duties under 29 U S.C. §1132 depending on where they are located Likewise, employees have different rights under that provision depending on where they live. Significantly, this is because of a split among the circuits regarding the interpretation of the "safe harbor" provision. *In re Washington Mut , Inc., Sec. Derivative & ERISA Lit* , 2009 WL 3246994 at *7 (W.D. Wash., Oct. 5, 2009) (acknowledging split between the circuits); *Page v Impac Mortgage Holdings, Inc.*, 2009 WL 890722, at *4 (C D. Cal., Mar 31, 2009) (same). Under such circumstances, there is a compelling reason for this Court to grant the petition of certiorari in this case U.S SUP. CT. R 10(a) (2009).

Were petitioners located within the jurisdiction of the United States Court of Appeals for the Fourth Circuit or within the jurisdiction of a number of Federal District Courts, petitioners would have easily survived a motion to dismiss. The same would be true in any jurisdiction that analyzed the motion to dismiss consistently with the DOL's guidance and the longstanding interpretation of ERISA by this Court, which requires that the statute should be interpreted

broadly in favor of plan beneficiaries and that ERISA exemptions, such as the "safe harbor" provision, should be construed narrowly.

A. The Seventh Circuit Panel Decision Disregards this Court's Holdings Regarding the Purpose and Interpretation of ERISA

This Court has explained that ERISA was designed to be interpreted broadly in favor of plan beneficiaries *Varity Corp* , 516 U.S. at 513; *John Hancock*, 510 U.S. at 96; *Central States*, 472 U.S. at 570. The Court has held that ERISA was designed with the purpose of protecting employee pension benefits and with the purpose of making clear what is required of employers so that they know their duties and rights throughout the nation. *Varity Corp* , 516 U.S. 489; *Fort Halifax Packing*, 482 U.S. at 15; *Central States*, 472 U.S. 559. This national predictability of rights and duties is further backed by the strong rules set forth by this Court regarding ERISA preemption. *Egelhoff v Egelhoff*, 532 U.S. 141, 149-50 (2001); *Fort Halifax*, 482 U.S. at 8-11 This predictability and uniformity benefits both employers and employees. *Egelhoff*, 532 U.S. at 149-50 ("Requiring ERISA administrators to master the relevant laws of 50 States and to contend with litigation would undermine the congressional goal of 'minimiz[ing] the administrative and financial burden[s]' on plan administrators – burdens ultimately borne by the beneficiaries") (brackets in original); *Ingersoll-Rand*

Co v. McClendon, 498 U S. 133, 142 (1990) ("Particularly disruptive is the potential for conflict in substantive law. . . . Such an outcome is fundamentally at odds with the goal of uniformity that Congress sought to implement."); *Fort Halifax*, 482 U.S. at 9 ("The most efficient way to meet [employer] responsibilities [under ERISA] is to establish a uniform administrative scheme, which provides a set of standard procedures. . . . Such a system is difficult to achieve, however, if a benefit plan is subject to differing regulatory requirements in differing states.") (brackets added).

Contrary to this Court's holdings, the Seventh Circuit panel's decision construes respondent's plan and respondent's duties in the manner least protective of plan beneficiaries. *Hecker v. Deere*, 556 F.3d 575 (7th Cir 2009), *suppl. by Hecker v Deere*, 569 F.3d 708 (7th Cir. 2009) This is not a case where the law clearly dictated a particular outcome on the motion to dismiss. In this case the petitioners' arguments had the support of the DOL and were consistent with a number of court decisions. Brief of the Secretary of Labor, Elaine L. Chow, as Amicus Curiae in Support of Plaintiffs-Appellants, *Hecker v Deere*, No. 07-3605, 08-1224 (7th Cir. Mar. 19, 2008); Brief of the Secretary of Labor, Hilda L. Solis, as Amicus Curiae in Support of Panel Rehearing, *Hecker v. Deere*, No. 07-3605, 08-1224 (7th Cir Mar 20, 2009), *DiFelice*, 497 F.3d 410; *In re Tyco Int'l*, 606 F. Supp. 2d 166; *Tatum v R.J Reynolds Tobacco Co.*, 254 F R.D. 59; *see also Hecker*, 569 F 3d 708 (addressing

DOL's support of petitioners' interpretation of the "safe harbor" provision in this matter). By rejecting these arguments on a motion to dismiss the Seventh Circuit panel failed to heed this Court's message that ERISA was intended to be construed broadly in favor of plan beneficiaries, *Varity Corp.*, 516 U.S. at 513; *John Hancock*, 510 U S. at 96; *Central States*, 472 U.S. at 570, and that exemptions to such a "humanitarian and remedial" statutory framework should be interpreted narrowly. *Varity Corp.*, 516 U.S. at 513; *Fort Halifax Packing*, 482 U.S. at 15; *Commissioner v Clark*, 489 U.S at 739-40; *Phillips v Walling*, 324 U.S. at 493.

B. The Department of Labor's Interpretations Are Consistent with this Court's Holdings Regarding the Purpose and Interpretation of ERISA

The Seventh Circuit panel, on a motion to dismiss, rejected the guidance of the DOL regarding the applicability of the so called "safe harbor" provision set forth in §404(c) of ERISA. It did so ostensibly because the directly relevant statement in the DOL regulations was contained in the preamble. *Hecker*, 556 F.3d at 589; *Hecker*, 569 F.3d 708. Yet, the DOL promulgated these regulations after considerable public comment and consideration and has asserted that the preamble reflects DOL's consistent interpretation of the "safe harbor" provision which is entitled to deference under, *Chevron U.S.A Inc v Natural Res Def Council*, 467 U S 837 (1984) *See*

Brief of the Secretary of Labor, Elaine L. Chow, as Amicus Curiae in Support of Plaintiffs-Appellants at 15-17, *Hecker v. Deere*, No. 07-3605, 08-1224 (7th Cir Mar. 19, 2008).

The Seventh Circuit panel's new rule that a court, on a motion to dismiss, can disregard directly relevant language in regulations promulgated by the agency charged by Congress to enforce a law – language that narrowly construes an exemption – is inconsistent with this Court's guidance set forth above that ERISA exemptions should be construed narrowly, and with this Court's holdings addressed below in Section II, that a motion to dismiss should not be granted under Rule 12(b)(6) where the nonmoving party has a plausible argument (as will be explained below petitioner's argument was more than plausible). *See supra* Section I, I A.; *infra* Section II. Moreover, the DOL filed a brief supporting petitioner's position on the §404(c) "safe harbor" provision. Brief of the Secretary of Labor, Elaine L. Chow, as Amicus Curiae in Support of Plaintiffs-Appellants, *Hecker v. Deere*, No. 07-3605, 08-1224 (7th Cir. Mar. 19, 2008); Brief of the Secretary of Labor, Hilda L. Solis, as Amicus Curiae in Support of Panel Rehearing, *Hecker v Deere*, No. 07-3605, 08-1224 (7th Cir. Mar. 20, 2009). Therefore, the DOL itself argued in this litigation that its regulations support petitioners' case. *Id.* at 15-17.

C. Decisions by the United States Court of Appeals for the Fourth Circuit and Several United States District Courts, that Reject the Interpretation Set Forth in the Panel's Decision in this Case, Are Consistent With This Court's Holdings Regarding the Purpose and Interpretation of ERISA

The Seventh Circuit panel's decision conflicts with decisions by the United States Court of Appeals for the Fourth Circuit, *DiFelice*, 497 F.3d 410, and several district court opinions. *Tibble v. Edison Int'l*, 2009 WL 2382340 (C.D. Cal., July 16, 2009), *clarified on other grounds*, 2009 WL 2382348 (C.D. Cal., July 31, 2009); *Page v Impac Mortgage Holdings, Inc.*, 2009 WL 890722 (Mar. 31, 2009); *In re Tyco Int'l*, 606 F. Supp. 2d 166; *Tatum v. R.J. Reynolds Tobacco Co.*, 254 F.R.D. 59. It is consistent with a decision by a divided panel of the United States Court of Appeals for the Fifth Circuit, *Langbecker v. Electronic Data Sys Corp* , 476 F.3d 299 (5th Cir. 2007), and with District Court opinions in the Seventh Circuit, which must follow the decision below in this matter. *Lingis v Motorola, Inc.*, 2009 WL 1708097 (N.D. Ill., June 17, 2009); *Abbott v. Lockheed Martin*, 2009 WL 839099 (S D Ill., Mar. 31, 2009). Notably, there was a strong dissent from the Fifth Circuit panel's decision, and that dissent is consistent with the Fourth Circuit's decision in *DiFelice* and with the DOL regulations. *Langbecker*, 476 F 3d at 319 (Reavley, J., dissenting) This demonstrates a split among the

circuits that this Court should address. U S SUP CT R. 10(a) (2009).

The Fourth Circuit, *DiFelice*, 497 F.3d 410, several United States District Courts, *Tibble*, 2009 WL 2382340; *Page*, 2009 WL 890722; *In re Tyco Int'l*, 606 F. Supp. 2d 166; *Tatum v. R.J. Reynolds Tobacco Co* , 254 F.R.D. 59; the DOL, 57 FED. REG. 49,906, 46,922 (Oct. 13, 1992); Brief of the Secretary of Labor, Elaine L Chow, as Amicus Curiae in Support of Plaintiffs-Appellants at 15-17, *Hecker v. Deere*, No. 07-3605, 08-1224 (7th Cir. Mar. 19, 2008), a judge dissenting from the Fifth Circuit decision relied upon by the Seventh Circuit in the present matter, *Langbecker*, 476 F.3d at 319 (Reavley, J., dissenting), and petitioners argue that the so called "safe harbor" provision does not apply to claims of imprudent selection of investment options. That interpretation is more consistent with this Court's holdings that ERISA should be interpreted broadly in favor of plan beneficiaries, and that ERISA exemptions should be construed narrowly *See supra* Section I, I.A , I.B The decision by the Seventh Circuit panel in this case and the majority of the Fifth Circuit panel in *Langbecker*, 476 F.3d 299, construe the "safe harbor" provision broadly – especially when compared to the DOL and Fourth Circuit's interpretations – and in a manner that is most harmful to plan beneficiaries. This Court should grant the petition for certiorari in this case to clarify the conflict among the lower courts and overturn the Seventh Circuit panel's opinion in this case.

II. The Seventh Circuit's Decision In this Case Conflicts with Fundamental Principles of Civil Procedure

In *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937 (2009) and *Bell Atlantic Corp. v Twombly*, 550 U.S. 544 (2007), this Court set forth the standards applicable to motions to dismiss on the pleadings. This Court held that where a complaint states a "plausible" basis for relief the complaint survives a motion to dismiss. *Iqbal*, ___ U S ___, 129 S.Ct. at 1949; *Twombly*, 550 U.S. at 556-59. A court still must construe factual allegations in the complaint as true, *Iqbal*, ___ U.S. ___, 129 S.Ct. at 1949-50; *Twombly*, 550 U.S. at 555, but this does not apply to legal allegations. *Id.* The reasons for this holding were clearly set forth by this Court in *Iqbal*, namely, requiring complainants to do more than list the elements of a legal claim without any factual support to suggest that the elements have been violated. *Iqbal*, ___ U S ___, 129 S Ct. at 1949-50, 1953-54.

Without stating such a plausible claim, this Court held, a complainant should not be able to proceed to the costly discovery process. *Id.* Significantly, the converse is also true. Where a complainant sets forth a plausible claim in the complaint a motion to dismiss on the pleadings should not be granted and the case should be allowed to move forward. *Twombly*, 550 U.S. at 556 ("Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable

expectation that discovery will reveal evidence of illegal agreement" [a central issue in *Twombly*]); *Id* ("A well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'").

Iqbal and *Twombly* do not alter the fact that a motion to dismiss on the pleadings is a gate-keeping motion, that is, when such a motion is granted with prejudice (as in this case) the complainant is locked out of court and precluded from seeking justice on the matter. Thus, under *Iqbal* and *Twombly*, as before, complaints should not be dismissed at the pleading stage on what ultimately would be the merits of the case. That is exactly what the Seventh Circuit panel did in this matter.

Petitioners set forth specific allegations in their complaint and connected those allegations to the legal claims asserted. Second Amended Complaint for Breach of Fiduciary Duty, *Hecker, et al v Deere & Co., et al* (W.D. Wis., No. 06-C-719-S, decided June 21, 2007) (complaint filed March 6, 2007). The complaint asserted more than a plausible claim as is evidenced by the fact that the DOL, the Fourth Circuit and several district courts support the actionability of such claims. *See supra* Section I.C. The Seventh Circuit panel argued that because the complaint anticipated the "safe harbor" defense under ERISA §404(c) it was brought into play for purposes of respondents' 12(b)(6) motion *Hecker*, 556 F.3d at 588-89. This may be true, but it simply means that the

Seventh Circuit panel could dismiss the case if the claims were implausible. *Twombly*, 550 U.S at 556. It does not mean that the Seventh Circuit panel should dismiss a plausible claim simply because it disagrees with it on the merits prior to discovery, and interprets the facts in a manner that supports the panel's own legal presuppositions as happened in this case. *See Swierkiewicz v. Sorema*, 534 U.S. 506, 513 (2002) (Rule 8(a) establishes a pleading standard without regard to whether a claim will succeed on the merits.); *Scheuer v Rhodes*, 416 U S. 232, 236 (1974) ("Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test."), *Cf Twombly* at 556 ("a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'").

Simply put, the complaint in this case set forth adequate facts to support the plausibility of the legal allegations therein. *See* Second Amended Complaint for Breach of Fiduciary Duty, *Hecker, et al v Deere & Co., et al* (W.D. Wis., No 06-C-719-S, decided June 21, 2007) (complaint filed March 6, 2007) As noted above, there is a substantial amount of law that demonstrates the plausibility of petitioners' claims. *See supra* Sections I., I A., I.B , I C. The gate-keeping function for a motion to dismiss on the pleadings set forth in *Iqbal* and *Twombly* is not served by preventing complainants from seeking justice on plausible claims *Twombly*, 550 U S. 556 Those cases do not stand for the proposition that courts should

dismiss potentially successful claims because at the pleading stage a court does not agree with the legal assertions in the complaint. *Id.*; *Iqbal*, ___ U.S. ___, 129 S.Ct. at 1949-50, 1953-54. This Court should grant the petition for certiorari in this case to correct the grave injustice created by the Seventh Circuit panel's dismissal of the complaint with prejudice and to clarify the law due to the conflicting decisions of the United States Courts of Appeals on this important issue.

CONCLUSION

For the reasons stated above, *amicus curiae* respectfully request that this Court grant the writ of certiorari in this matter.

Respectfully submitted,

PROFESSOR FRANK S. RAVITCH
MICHIGAN STATE UNIVERSITY
College of Law
Room #315
Law College Bldg.
East Lansing, MI 48824
(517) 432-6973

Counsel of Record

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